United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1364

6cc

B

P/S

UNITED STATES COURT OF APPEALS

JAN 1 1976

For The Second Circuit

UNITED STATES OF AMERICA ,

Apellee

- against -

ROBERT BENNETT SCHWARTZ, et ano

Appellant .

On Appeal from the United States District Court
For The Eastern District of New York

APPELLANT'S BRIEF

and

APPENDIX

ROBERT B. SCHWARTZ
Appellant pro se
(# 83250)
P.O. Box 1000
Lewisburg , PA. 17837

PAGINATION AS IN ORIGINAL COPY

Certificate of Service

I hereby certify that a true copy of the within Brief and Appendix ,

placed in a sealed envelope, was mailed through the Mail Room

at the United States Northeast Penitentiary to each of the following:
(P.O. Box 1000, Lewisburg, PA 17837)

United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Dated: December 31, 1975

Signed: Robert B. Schwartz

Robert B. Schwartz - Appellant *pro se*
83250
P.O. Box 1000, Lewisburg, PA 17837

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA ,

Apellee

- against -

ROBERT BENNETT SCHWARTZ, et ano

Appellant .

On Appeal from the United States District Court
For The Eastern District of New York

APPELLANT'S BRIEF

and

APPENDIX

ROBERT B. SCHWARTZ
Appellant pro se
(# 83250)
P.O. Box 1000
Lewisburg , PA. 17837

APPELLANT'S BRIEF

TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF CASES CITED (Continued)

TABLE OF CASES CITED (Continued)

TABLE OF CASES CITED (Continued)

TABLE OF CASES CITED (Continued)

TABLE OF CASES CITED (Continued)

TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS

TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS (Continued)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

UNITED STATES OF AMERICA, 75 - 1364

Appellee,

- against -

ROBERT BENNETT SCHWARTZ, et ano

Appellant.

- X

STATEMENT PURSUANT TO RULE 28(3)

This is an appeal from a judgement of the United States District Court for the Eastern District of New York after a jury trial convicting appellant Robert Bennett Schwartz of a single count of conspiracy to

1. Import and bring into the United States Heroin and Cocaine;

2. receive, conceal, buy and sell and facilitate the transportation and concealment and sale of Heroin and Cocaine; and

3. Conceal the existance of the conspiracy

between November, 1969 and April, 1971 all in violation of Sections 173 and 174 of Title 21, United States Code (the old law).

Robert Bennett Schwartz (hereinafter refered to as Mr. Schwartz) was sentenced to 10 years imprisonment and a fine of $ 20,000.00 on the single conspiracy count.

Dafney Schwartz, a/k/a Joyce (hereinafter refered to as Mrs. Schwartz) was tried and convicted in absentia. She was represented at Trial by Gilbert Epstein, Esq..

Mr. Schwartz was represented pre-trial by Albert J. Krieger, Esq. and appeared pro se at trial. Mr. Schwartz continues pro se upon this appeal except that he now proceeds in forma pauperis pursuant to Rule 24 F.R.App.P..

(Although proper and timely request was made for the transcripts herein appellant has not been supplied with pages 1 through 476 of the record covering essential pre-trial hearings and proceedings. I do not feel that I should have been so limited because of

my indigency and should have been afforded the same consideration the government enjoys in presenting all of the errors of law for this Court's consideration. However, far too much time has passed in attempting to secure this record for I have been incarcerated since April 18, 1974 and am presently confined in Lewisburg Penitentiary. To seek further time to get the balance of the record only runs to my prejudice. Hopefully, I will have these minutes in time to suppliment this brief or to reply to the government's .)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

1. Whether the search warrant was procured by fraud by an affidavit containing intentional, relevant and non-trivial misrepresentations of material facts ?

A. Whether the mass seizure of the entire contents of a safe deposit box was beyond the scope of a search warrant specifying seizure of U.S. currency ?

B. Whether the seizure of documents violates the Fifth Amendment ?

2. Whether the wiretap application was void in violation of the Statute Title 18 U.S.C. 2518 ?

A. Whether the government's failure to identify and serve inventory notices on Mr. and Mrs. Schwartz (Joyce) as persons known to be committing the offense, whether deliberate or inadvertant,requires suppression of the wiretap evidence ?

B. Whether the submission of disputed transcripts to the jury over objection was reversable error by the trial court ?

C. Whether there was no minimization as required by 2518(5) ever employed or contemplated ?

3. Whether prosecutorial delay in seeking this indictment has prejudiced defendant's Fifth Amendment rights to a fair trial requiring dismissal of the indictment ?

4. Whether there was a prejudicial variance between the indictment and the proof requiring dismissal of the indictment ?

A. Whether the covering over of "Overt Act 2" by the court and the submission of the indictment to the jury was reversable error ?

B. Whether there was a prejudicial variance in that a single conspiracy was charged and multiple conspiracies proved ?

5. Whether the impartiality of the trial judge was reasonably called into question prior to and during the presentation of evidence requiring recusal under Title 28 U.S.C. 455 ?

A. Whether it was reversable error for the court to receive in evidence on the trial money, a deed, photographs and an affidavit of Robert Bennett Schwartz ?

B. Whether it was error to charge the jury regarding misprison of a felony under 18 U.S.C. 4 ?

C. Whether the cross examination of agent Dugan by the court and it's charge thereon was prejudicial error ?

D. Whether it was reversable error;to try Dafney Schwartz in absentia, to permit the government to open on flight and to charge the jury thereon ?

E. Whether there was no guidance given the jury for them to be able to specifically find the substance allegedly possessed was heroin or cocaine ?

STATEMENT OF FACTS

The governments' case consisted of the following:

The testimony of Luis Ureta Morales, a/k/a Sergio Jaramillo (hereinafter called Lucho,* 652-1035); Edwardo Ferrada a/k/a Gino Fantuzzi (hereinafter called Fantuzzi, 2321-34); Claudine Lierros (hereinafter called Lierros, 1035-1198) all of whom were defendants in U.S. v. Fantuzzi, 436 F.2d 683 (2 Cir.1971), presently serving the following sentences: Lucho, 15 years; Fantuzzi, 15 years and Lierros;25 years.

Carmen Estrada (hereinafter called Estrada, 1234-1576,1570-75) one of the two informants in U.S. v. Fantuzzi, supra..

Hugo Pineda,(hereinafter called Pineda, 1546-75) a drug dealer brought to the United States under arrest on December 20, 1974 and cooperating since that day by agreement with the government and who has been convicted by plea to three indictments and is awaiting sentence thereon.

The testimony of agents Bocchichio (1589-1666, 1808-12); Dugan (1529-41); Cipriano(1692-17 08, 1722-85,1813-1923); McCarthy (1854-82);Featherly (1892-1923) through which the following evidence was presented:

Certain portions of the "Fantuzzi" wiretap, and money and documents seized from a safe deposit box.

The defense case consisted of the following:

Ivan Fisher,Esq.(2026-72); Marguerita Mensa(interpreter for the Eastern District, 2072-76); Aron Jaffe,Esq.(2081-85); Irving Katcher,Esq.(2216-48); Edwin Torres,Esq.(2248-51) none of whom were character witnesses.

Agent Tobin,(2098-2120) the agent who first debriefed Lierros in 1973.

Certain portions of the "Fantuzzi" wiretap(2253-80, 2350-61) which included conversations of Jose Landetta,(hereinafter called Jose) the other Fantuzzi informant.

Taped conversations in May and June, 1970 within the Fantuzzi tap between Estrada and Dugan (2485-89)

Fantuzzi, as a limited defense witness in connection with the tapes(2149,2278-90,

2297) and then when the government was permitted to re-open it's direct case by their cross-examination the defense continued (2378-2404).

Agent Featherly, (called against the government's re-opened case) for his report and expertise(2406-30).

Richard Rosencranz, Esq., attorney for Carmen Lopez(hereinafter called Kitty)a Fantuzzi defendant; to show government misconduct regarding a prospective defense witness (2335-43).

Vladimir Benderas, a convicted drug importer and government informant, one of Lierros suppliers and relative of Lucho (2439-42).

Francisco Guinart, a/k/a Rojas in the Fantuzzi case, supra.; presently convicted and sentenced; a co-conspirator with knowledge of the Fantuzzi cocaine (2463-83).

Agent Dugan, case agent in Fantuzzi regarding his observations, information and reports during 1970 the time of the Fantuzzi conspiracy (2489-2510) .

THE TRIAL

Lucho testified that as a result of an arrest of two of his men in California on May 6, 1970, he through Lierros, sought help from Mr. Schwartz. Lucho could speak no english and Mr. Schwartz, no spanish so Mr. Schwartz selected Italian, a language they were both conversant in. Thereafter Mr. and Mrs. Schwartz sought to induce Lucho to sell them large quantities of cocaine. Lucho didn't have any cocaine then but stated he would be able to supply 10 to 15 kilo's in 1 or 2 weeks. Upon leaving Lucho meets Juan Besolo, a drug dealer with a separate operation, who offers to let Lucho sell 5 kilo's for him because Besolo is disatisfied with the efforts of Pineda. Lucho then calls Mr. Schwartz and tells him, in italian, to expect him. He meets with the Schwartzs' and Mrs. Schwartz, using the only italian word she knows, immediately asks for heroin. Lucho and Mr. Schwartz engage in a conversation, in italian, regarding heroin, before any discussion of cocaine, wherein Lucho states that heroin is not his business but he will see what he can do. Then they complete an arrangement for 5 kilo's of cocaine and Lucho goes back to Besolo and through Besolo, Sepulveda and Borgono received only 2 kilo's which he and Fantuzzi deliver,

Only Lucho enters and gives the two kilo's to the Schwartzs' and is to be paid the next day. The next day Fantuzzi again drives Lucho and he alone enters to collect $21,000.00 from Mr. Schwartz. At this time the phone rings and it is Kitty calling for Lucho and shortly thereafter shows up with Estrada. Lucho then purchases a small quantity of cocaine for their use from Mrs. Schwartz and they all leave.

Lucho thereafter runs into his old friend Pineda, who he has never done business with before; who has 3 kilo's of Besolo's cocaine that he can't sell,(Neither Besolo, Sepulveda or Borgono, are called on the trial). Lucho and Pineda agree that Lucho will sell this cocaine for them so that Pineda can get 10 kilo's from Besolo in the future which they can also sell as partners. At this time Lucho hears from Guinart who informs him they must go to Texas(to pick up, what Lucho already knew since Chile would be 26 kilo's of cocaine (854)). see U.S. v. Fantuzzi, supra.. Lucho then takes Pineda to the Schwartzs' after he alone had delivered the 3 kilo's. He does not tell them of the arrival of his cocaine for that is "another thing" but says that they can do business with Pineda for 10 kilo's as originally promised.(Lucho testifies at (938)"I don't unerstand what kind of relationship exists between my trip to Texas and this" case.) Pineda states that he expects 10 kilo's of cocaine, in futuro,(which never happens) and he will be in touch and both he and Lucho leave. (Lucho, Kitty, Guinart and Villeseca(now Letellier) are arrested in Texas,(See Fantuzzi at 686) through Dugan and Texas agents based upon information furnished by Estrada.) After Texas they return to New York, Lucho, on May 29, 1970 goes to the Schwartzs' and receives the balance owed on the 3 kilo's . Payment is made to Lucho in the presence of Lierros and Pineda. There is a meeting between Guinart, Letellier and Lucho on June 6, 1970 regarding the Texas cocaine which Lucho decides to try to move. He thereafter goes to the Schwartzs' and says that they should get their money together as he expects to have something for them. Lucho, Fantuzzi, and Kitty are arrested by Dugan on June 9, 1970 and everything is aborted.

Lierros testifies to several cocaine transactions with Mrs. Schwartz from November 1969 to early 1970. Delivery of which were made by one Andres Rodriguez (1047) and

although it was not her business to deal in heroin claims two separate sales of heroin to the Schwartzs'(1085) in July of 1970 at a time when she is in hiding for fear of arrest in the Fantuzzi case and won't go in the street. She testifies to transactions during this May 1970 period with one Richard Wheeler(1139) as well as so many others that it is impossible for her to remember them all.The end of July 1970 she goes to Florida where through James Christian a/k/a Bruno (see Fantuzzi,supra.) she now starts to sell heroin and is arrested there for conspiracy in a large heroin deal. After she goes to Florida she has no further contact with the Schwartzs'. She agrees that Lucho spoke Italian with Mr. Schwartz a language she cannot understand.

Estrada testifies to corroborate much of Lucho's testimony and tells of the sale of this small quantity of cocaine to Kitty in her presence. She also tells of her part during this time as an informant and that she was telling Dugan everything that was going on. She agrees that Lucho spoke Italian to Mr. Schwartz, a language she does not understand.

Pineda testifies corroborting parts of Lucho's testimony while telling of his participation. He leaves the United States on May 30, 1970 and was not a defendant or co-conspirator in the Fantuzzi case. He too agrees that Lucho and Mr. Schwartz spoke Italian a language he does not understand.

Both Bruno and Lierros are in custody before the end of 1970 and were tried as defendants in Fantuzzi.

---

n.1 * the numbers in brackets refer to the parts of the trial record unless otherwise stated .

n.2 The facts above have been spelled out in the light most favorable to the government as this Court will view them. There were over 2200 pages of record devoted to the trial and to spell out the various areas of conflict would make this fact statement run on endlessly. Specific references to essential parts of the record are made under the respective Points raised in the brief. It was conceeded by both side that the that the real factual issue in this case was credibility regarding the events; the speaking of Italian by Mr. Schwartz and Lucho; the roles of the parties and the question of possession or sales of heroin and cocaine as there was no physical evidence of the drugs nor analysis.

POINT I

THE SEARCH WARRANT WAS PROCURED THROUGH FRAUD BY AN AFFIDAVIT CONTAINING INTENTIONAL, RELEVANT AND NON-TRIVIAL MISREPRESENTATIONS OF MATERIAL FACTS AND CANNOT STAND

AFTER their arrest the defendants, on December 20, 1974, secured a civil injunction against the government (74 C 1805) to prevent further action by the I.R.S. and the Department of Justice regarding the seizure of their property by levy and distraint in violation of the Fifth Amendment and against the fear that the government would erroneously attempt, ex parte, to get search warrants issued to examine the contents of certain safe deposit boxes. The claim was, in substance, that their due process rights had already been violated by the calculated and joint action of Justice and the I.R.S. and immediate action was necessary to prevent wholesale rummaging therein. The government argued that the action of the I.R.S. could not be interfered with and this was not the proper remedy. They argued that the proper forum was the Tax Court (but see Shapiro v. Sec. of State, 499 F.2d 527, cert. granted 1975) and the stay was lifted on December 23, 1974. The matter was then adjourned until January 3, 1975 for briefs from both sides pending final action by the court.

Thereafter, on December 26, 1974, in a carefully drafted affidavit, prepared by the U.S. Attorney's office for agent Cipriano, 5 separate search warrants were secured for 5 different safe deposit boxes in two Banks in Manhattan, from Magistrate Raby, in the Southern District of New York.(No mention was made in this affidavit of the fact that 74 C 1805 was pending in the Eastern District or of the seizures already affected).

Thereafter motions to controvert and surpress were made to Judge Judd which incorporated by reference 74 C 1805. The basic allegations therein were, amoung other things, that the Magistrate was the victum of deception by intentionally false averments of material facts and that everything contained therein was seized under a warrant specifying only "U.S. Currency". No answering papers came from the government in the first instance. A full and complete hearing of all of the underlying circumstances was

requested of the court. On February the court by memorandum specifically limited and restricted inquiry to two issues it would consider in a hearing scheduled for February 24, 1975. Upon completion of the proceedings the court found that there were differences in the facts presented, but up-held the warrant simply failing to consider the total impact on the issuing Magistrate. As an example the court on February 7, 1975, specifically directed the government to reply to a material averment made by agent Cipriano and seriously questioned by the defense, as follows:

* "2. Investigation by your deponent reveals that neither Robert Bennett Schwartz nor Dafney Schwartz has filed an income tax return since at least 1968. Moreover Dafro Realty and Construction Corp. has not filed income tax returns since at least 1968."

Mr. Schlam, the assistant U.S. Attorney infered, at that time, that Cipriano got his information directly from the I.R.S.. The government was directed to respond as to when the I.R.S. first got their information, with some documentation. Defendants' attorneys' sought a further response to the specific language used by Cipriano; "Investigation by your deponent"; talking about his own individual investigation; his own knowledge and also seeking government response to their motions in general. To this the court replied :

" If there is no such response, it will be treated as if there is no such response and if Mr. Schlam submits additional papers, I'll consider them on Wednesday."

Mr. Schlam filed an affidavit which in plain terms shows that within the four corners of this material averment, Cipriano lied. If Schlam's affidavit is true, than Cipriano got the information for clause 2 of his affidavit from Mr. Schlam and Mr. Schlam got it from agent McCormick, who in his separate affidavit states "his investigation" had determined that the Schwartzs' failed to file income taxes since at least 1968. Which in no way conforms to the court's direction to show when I.R.S. first got their information with some documentation. Anyone with the slightest knowledge in this area knows this comes from a computer print out request answered by a dated "Certified" I.R.S. form 2866 by the Director of the Computer Service Center.

* see appendix

But that is the least consideration for it is indeed strange why Mr. Schlam with full opportunity to sp eak on the record on February 7, 1975, when the issue first arose chose to remain silent regarding his being the source of Cipriano's "investigation"? Nevertheless it is clear that Cipriano purposely made it appear that he was the one who made the finding and is speaking from his own personal knowledge. Simply look at the way his affidavit specifically reflects the sources of his information in averments 4, 5, 6, 7, and 8 . In 4. his information is as a result of a hearsay interview of Officer O'Connor; 5. is a hearsay interview of bank officers and tellers; 6. is a hearsay interview of bank employees; 7. indicates a hearsay source of other agents experience; and 8. indicates hearsay information through officer Slattery. Clearly then, Cipriano's actions here were intentional; compounded by the fact that his affidavit was prepared by Mr. Schlam's office in the first place. The Magistrate had no basis upon which he could credit the source of Cipriano's statements, other than to Cipriano himself. It is also clear that the statement regarding Dafro Realty Corp!s failure to file, cannot even be supported through McCormick or Schlam and is patently false. This on it's own is an equally relevant, non-trivial and intentional mistatement of a material fact for there was a warrant issued for a safe deposit box in the corporate name, issued on little more than this averment alone. The issue of the failure to file appears on the face of all 5 warrants issued. There can be little doubt that the averments in clause 2 of the affidavit were material to the issuance of the warrant. Whether out of kindness or caution we call it a negligent mistatement of a material fact or a knowing mistatement, instead of a lie, the fact remains that the warrant cannot stand. U.S. v. Bozza, 365 F.2d 206, 223-24 ; U.S. v. Sultan, 463 F.2d 1066,1070 .

If this were the affidavit of a private citizen, without the sanction and protection of the U.S. Attorney's office, he could be subject to a fine and imprisonment for such an averment.

In U.S. v. Belculfine, 508 F.2d 58 the Court at page 62 states:

" We see no policy reason for overlooking intentional, relevant and non-

> trivial mistatements in an affidavit which could subject the maker of such, be he an official or private citizen, to a fine or imprisonment for perjury ..... Indeed policy suggests particular sensitivity to such mistatements in an affidavit for a search warrant which is necessarily granted ex parte and in complete reliance upon the truthfulness of the statements in the affidavit."

Hearsay declarations are proper so long as the magistrate is supplied with a " substantial basis"for crediting the hearsay. U.S. v. Harris, 403 U.S. 573,581; Jones v. U.S., 362 U.S. 257,271; U.S. v. Burke, 517 F.2d 377. Where as here the Magistrate is not so informed or is intentionally deceived than he can no longer function in a neutral and detached manner and becomes nothing more than what is uniformly condemned as"A Rubber Stamp" for the police. U.S. v. Ventresca, 380 U.S. 102; McDonald v. U.S., 335 U.S. 451; Johnson v. U.S., 333 U.S. 10,14; U.S. v. Holmes, 521 F.2d 859, 871-72.

Rather than face the issue squarely judge Judd in his Memorandum of February 18, 1975 simply eliminated this averment from consideration and upheld the warrant on the basis of the other averments stating:

> "There is enough in the search warrant application to justify the issuance of the warrant without reference to income tax deficiencies. A search warrant should not be invalidated because of doubts concerning superflous statements."

The true coursefor a judge to follow is to face the issue, however distasteful and surpress the evidence. The following language is instructive in that regard:

> " Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy in the light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to loose in strengthening and otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy. We see no supportable alternative to surpession of evidence obtained pursuant to a warrant containing an intentional, relevant and non-trivial mistatement.We see no basis for confining this sanction to false statements made with the specific intent to deceive the magistrate as oppossed to false statements merely intended to"round out the picture". U.S. v. Belculfine, supra at 63.

THE AFFIDAVIT FAILED TO ESTABLISH PROBABLE CAUSE AT THE TIME THE WARRANT WAS APPLIED FOR

The affidavit for the search warrant was submitted December 26, 1975(14 days after the arrest) and contains therein a reference to the indictment which ends in April 1971. Then a hiatis of 3 years with no mention of observations or information and picks up in 1974 with "time" specificity that ends in June 1974. Clause 8 thereof is steeped in hearsay and is cleverly drafted in the present tense (March of 1974 to the present time) to describe an alleged meeting with a Mr. Osborne and ends with a reference to an informant who "advised"(nothing to show when) the Schwartzs' are "presently engaged in the narcotics traffic."

The mere fact that the present tense is used is just not sufficient. Unless there is a specific reference to the time the information was received; than it could have been a day, a week or months before the date of the affidavit. Rosencranz v. U.S., 356 F. 2d 310. To infer that this undated information speaks of a date close to that of the affidavit opens the door to the unsupervised issuance of search warrants; to allowing officers to supply information of questionable recency; to making Magistrates a "rubber stamp" for the police. Rosencranz, supra. at 315-18. Probable cause must exist at the time the warrant is issued . Sgro v. U.S., 287 U.S. 206. The essence of the affidavit is the time of the affiants observations or information. Poldo v. U.S., 55 F.2d 866,868. The absence of the day and month from the averment is a glaring defect, if omitted. Kohler v. U.S., 9 F.2d 23. The time of the underlying facts is crucial and the validity of the warrant must be determined by proximity or remoteness of the events to the time it is sought. Schoeneman, v. U.S., 317 F.2d 173; see also Gooding v. U.S., 40 L.Ed. 2d 250 at 273.

No more persuasive is the arguement that the activities in t he warrant implied continuity and therefore point up the likelihood of accuracy of information gathered sometime in the past. Carrol v. U.S., 267 U.S. 132; Durham v. U.S., 403 F.2d 190,195.

Where as here there are no dates and no indication, within measurable limits of time, to the events refered to, the facts must be presumed stale.U.S. v. Boyd,422 F.2d 791.

There is nothing to show that on any occaission the Schwartzs' were seen depositing money in these boxes or were known to have done so by an informant or otherwise. If this is "laundering" cash by persons in the drug business to pay for the narcotics in large bills, it would boarder on the frivilous for a person to conclude that such active dealings would justify the conclusion, by a reasonable man, that the money remained at a stationary location for any period of time. U.S. currency is by it's very nature a movable item, as opposed to/a fixed item of personalty. There is nothing whatever within the four corners of the affidavit to establish, from bank records or employees, entries into the various deposit boxes at all; let alone on or about the 3 undated occaissions in April and May of 1974 in clause 4. Nor is there anything shown in close proximity by actual record, which the government had already acquired by subpoena, to these undated times in early 1974 that some un-named officers told officer O'Connor,who told Cipriano,who told the Magistrate, Mrs. Schwartz was observed to enter the safe deposit areas of two banks.

The Magistrate then, was forced to reach for external facts not within the four corners of the affidavit and to build inference upon inference to create timely probable cause, which he cannot do . Rosencranz supra. 356 F.2d 317; see U.S. v. Casino, 286 F.2d at 978; U.S. v. Holmes, 521 F.2d 859,872.

The Official Instructions to U.S. Commissioner's for over 20 years, where the particular property (U.S. currency) can, by it's very nature, be moved away during an intervening period of time provide:

> "The facts must show that the property to be seized was <u>known</u> to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the warrant." Durham, supra. 403 F.2d at 194; Jones v. U.S., 362 U.S. 257,271; see also U.S. v. Burke, 517 F.2d 377,381.

There must be some statement in the affidavit, in the case of removable articles, that the existance of the personal property remained at the described location. U.S. v. Neal, 500 F.2d at 309.

Cipriano further states in clause 8 that a reliable informer "advised" another

officer who informed him the Schwartzs' "are presently engaged in the narcotics traffic", without any underlying circumstances, as to when this advice was given; or from which the informant drew his conclusions. When an affiant seeking a search warrant relies upon hearsay, he must, pursuant to Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United States, 393 U.S. 410, set forth in the warrant application " some of the underlying circumstances," from which the informant drew his conclusions concerning narcotics trafficing. In addition, informants tips relayed through two agents to the Magistrate, however accurately reported, unnecessarily reduce the magistrates ability to make an independant determination of the informations reliability and he is reduced to nothing more than a "rubber stamp" for the agent. see sg. U.S. v. Fiorella, 468 F.2d 688, 692.

A. THE MASS SEIZURE OF THE ENTIRE CONTENTS OF A SAFE DEPOSIT BOX WAS BEYOND THE SCOPE OF A SEARCH WARRANT SPECIFYING SEIZURE OF U.S. CURRENCY

The warrant in the instant case only authorized the seizure of"United States Currency" contained within safe deposit boxes. The true purpose of the search was to seize and examine everything found therein. Upon open the box any U.S. currency contined therein is immediately apparant and subject to seizure. The very confined area of a safe deposit box,on opening,also exposes the general nature of the other items contained therein. In the instant case the entire contents of the box were seized and* inventoried. This was listed as $ 75,700.00 U.S. currency; a small amount of foreign currency; a large quantity of various items of jewelry; a quantity of stock certificates and 3 folders and serveral loose papers concerning business records and financial holdings. This latter item (3 folders) when removed to the U.S. Attorney's office for examination became weeks later 238 separate documents all of which were clearly private, personal papers and included a birth certificate; marriage liscense, Deeds, contracts, insurance papers, attorney's correspondance, suspension notice to Robert Schwartz, various letters, automobile invoices and various

* (see appendix)

other records, papers, photographs and documents. In short a micro cosim of peoples lives.

This seizure to be justified at all must be under the " plain view doctrine" by which incriminating evidence is inadvertantly discovered during the course of a search made pursuant to a warrant. Coolidge v. New Hampshire, 403 U.S. 443. This means while looking for but not yet discovering the specified objects of the search. Where as here the officers upon opening the box see the specified object (U.S. currency) the purpose of the warrant has been satisfied(U.S. v. Dzialak, 441 F.2d 212,217; U.S. v. La Valle, 391 F.2d 123,127). The continued general exploratory rummaging through the rest of the items contained in the box with the resultant mass seizure of the entire contents which are carried away for further examination violates the very Fourth Amendment which creates the right to search in the first place. For the extension of the original justification is legitamate only where it is "immediately apparant" that the police have evidence before them and the "plain view doctrine" may not be used to extend a general exploratory search from one item to another until something incriminating at last emerges. Coolidge, supra at 467; see Stanley v. Georgia, 394 U.S. at 57-72, Stewart,J. concur.; Kremen v. United States, 353 U.S. 346 .

"The search should be as limited as possible" for the problem is not that of the intrusion per se but of a general exploratory rummaging in a person's belongings. See eg. Boyd v. U.S., 116 U.S. at 624-630; Marron v. U.S., 275 U.S. 192,195-96; Stanford v. Texas, 379 U.S. 476; as per Coolidge supra. at 467.

It is clear that the vice in the instant case was the unlimited search of the box and the seizure and removal of its entire contents in order to be read and examined, to determine whether they are incriminating. U.S. v. Bennett, 408 F.2d 888,897.

In the instant case there is even evidence of an intention to seize anything found in the boxes before the warrant ever issued. Prior to the application for the search warrants the U.S. Attorney's office issued grand jury subpoenas to the banks to secure not only the box numbers if any, but broad disclosure of the Schwartzs' financial records.

This was after the indictment in the this case was issued and the defendants' arraigned thereon. No appearance was made before any grand jury thereon, nor was the information presented to the grand jury on the return date. It was simply collected and picked up by agents. The government was in affect abusing the process of the grand jury solely to seek evidence in preparing an already pending indictment for trial. see U.S. v. Dardi, 330 F.2d 316,336; Derbinv. U.S., 221 F.2d 520,522; U.S. v. Miller, 508 F.2d 583, n.6, -- Mr. Justice Powell's caveat in Calif. Bankers, 39 L.Ed. 2d at 350-51. In short grand jury subpoena's were used to get the box numbers to give to I.R.S. so that they could affect for the U.S. Attorney, levy and distraint, and thereafter the U.S. Attorney would get a search warrant to see what was inside and seize the contents. This is clear evidence of the prior intent by the government to seize whatever was found therein. See Coolidge supra. 403 U.S. at 470-71. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a mans safe deposit box and once inside to launch forth with all of the unbridled and illegal power of a general warrant. Stanley v. Georgia, supra 394 U.S. at 571-72.

B. THE SEIZURE OF THE DOCUMENTS VIOLATES THE FIFTH AMENDMENT

The 238 documents themselves are "testimonial and communicative" and could not have been compelled by subpoena as the 5th Amendment privilege against self incrimination would have been an absolute defense. The use of a search warrant does not alter this result. In Couch v. United States, 92 S.Ct. 611 at 620, Brennan, J. states:

> "Where the government takes private records from, for example, a safe deposit box against the will of the owner of the documents, the owner has been compelled, in my view to incriminate himself within the meaning of the Fifth Amendment." (see n.20 Couch, supra at 620 refering to pp. 618-19, nn 15-18)see also Hill v. Philpott, 445 F.2d 144; Schermerber v. California, 384 U.S. 757.

The money seized and some of the documents (see Point infra.) were used and introduced at the trial to the substantial prejudice of the Schwartzs'.

POINT II

THE WIRETAP APPLICATION WAS VOID IN VIOLATION OF THE STATUTE TITLE 18 U.S.C. 2518

On May 23, 1970 agent Thomas Dugan made application by affidavit to Hon. Inzer B. Wyatt, for a wiretap order (see U.S. v. Fantuzzi, supra 463 F.2d nn. 3,5). In his affidavit Dugan sets forth probable cause as flowing almost entirely from facts supplied by an un-named reliable informant (Estrada). The reason for seeking the wiretap was the boilerplate recitation that other investigative techniques have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous. Followed by a statement that the informant would not out of fear, ever appear as a witness for the government. This statement was not only incomplete but was false and misleading.

For the first time on this trial the Fantuzzi informant(2490) Estrada testified that she furnished Dugan, on several occaissions, with information regarding Mr. and Mrs. Schwartzs' narcotic involvement in the Fantuzzi conspiracy the end of April or the bogining of May, 1970 (1306-07). Dugan corroborates this as early as April 1, 1970 (2490-93). This was long before the wiretap application to judge Wyatt. Estrada was operating at the very core of the conspiracy. She was living at Kitty's apartment where the tap was placed and was reporting to Dugan on almost a day to day basis regarding the identities and activities of all of the persons involved. Estrada further testified that it was she who suggested the wiretap to Dugan

> "because this way he would get more information of all of the people that were going there and I don't have to come to this building and be calling him and telling him everything." (1311-12, 2495-96)

None of this information was conveyed to Judge Wyatt. In fact even before the wiretap Dugan had planned an arrest in Texas based almost entirely upon information supplied directly by Estrada. This would have been the Fantuzzi case were it not for the fact that "the federals are stupid", they only had waited a half hour they'd gotten 27 kilos." (Fantuzzi supra at 686). For a wiretap to issue the government must supply the judge with adequate facts showing why the techniques employed were not sufficient in the particular investigation. Title III was not designed to replace normal investigation.

see U.S. v. Giordano, 416 U.S. 505, U.S. v. Kahn, 415 U.S. 143. One thing is clear and uncontradicted throughout Fantuzzi and this trial. Estrada was successful before the wiretap, during the tap and even after the tap and that normal investigative techniques were fruitful before the tap and continued fruitful during the tap as Estrada continued coming to the Eastern District, calling Dugan and telling him everything (see Dugan Tapes, 1419-20, 1424-26, 2022). In addition Estrada was one of the main government witnesses in Fantuzzi supra; testified in over 300 pages in the instant case; in removal hearings and in two other cases was a main government witness, both investigations of which commenced before Fantuzzi. In the instant case the government's"logical alternative" to wiretapping was Estrada and normal investigation. The affidavit did not contain enough data from which the issuing judge could reasonably conclude that other means would be unlikely to succeed. See U.S. v. Steinberg,___F.2d ___, 2 cir. November 11, 1975 Slip at 6438. In addition the failure to bring to the judges attention facts which if known would cause him to hesitate in acting is as much an imposition on a judicial officer as an intentional lie that appears on the face of the affidavit.

Since Estrada had no problem in determining the scope of the Fantuzzi operation; the identities of the persons involved; the sources of his supply and in truth was readily available to testify to what she knew leaves little doubt that the mandate of the statute that "a full and complete" statement be made to issuing judge was just not complied with. 18 U.S.C. 2518 (1)(c) and (3)(c); U.S. v. Steinberg, supra .

Even if the arguement were made that at the time of the affidavit Estrada would not testify, which flies in the face of reality, the 9th Circuit, in a well reasoned opinion decided August 4, 1975 has examined a similar issue involving the bald assertion that the informer would not testify and theboilerplate assertion, coupled, as here, in the same application and held that this is just not sufficient to satisfy the statutory requirements. see U.S. v. Kalustian, ___F.2d___, 17 Cr.L 2428 and the authorities cited therein.

A. GOVERNMENT'S FAILURE TO IDENTIFY AND SERVE INVENTORY NOTICES ON MR. AND MRS. SCHWARTZ (JOYCE) AS PERSONS KNOWN TO BE COMMITTING THE OFFENSE WHETHER DELIBERATE OR INADVERTANT REQUIRES SUPPRESSION OF THE WIRETAP EVIDENCE

As stated herein prior to the wiretap application Dugan was supplied with information that Mr. and Mrs. Schwartz(Joyce) were persons involved in the Fantuzzi conspiracy and naturally could be expected to be overheard on Kitty's telephone. The statute requires both the applicant and the court to specify the person, "if known" and who the authorities have probable cause to believe is committing the offense for which the wiretap is sought. 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a); United States v. Kahn, 415 U.S. 143,155; U.S. v. Chiarizio, ____F.2d____, 2d. Cir. November 11, 1975. Even where there is only the probability that the individual will be intercepted that individual must be identified, by name. If this is not done than the orders are invalid and the evidence therefrom inadmissible. 18 U.S.C. 2515; U.S. v. Chiarizio,supra. The government cannot argue that the information against the Schwartzs' was peripheral as Estrada says she told Dugan they were part of the operation and Dugan being the agent who applied for the wiretap was aware of the Schwartz-"Fantuzzi" connection before he made the application, U.S. v. Chiarizio, supra at 497, (2011-12).

Not only were they not named in the original application but during the wiretap when conversations of Mr. Schwartz and Mrs. Schwartz(Joyce) were actually intercepted between May 24, 1970 and June 7, 1970, the government ignored it's obligation set by judge Wyatt to report to him on the progress of the wiretap (18 U.S.C. 2518(6)) and the nature of the persons intercepted. The government's attempt to set before judge Wyatt a list of persons intercepted,claiming only that some of these persons were prospective defendants without any attempt to specify which persons they were and what their information revealed,allowed the government to substitute itself for the sound exercise of discretion by the issuing judge and with-held from him,intentionally, basic information upon which he could intelligently determine the issue of notice.

A judge cannot exercise his discretion in a factual vacuum. The failure of the government to provide the judge with even a general description of the Schwartzs' participation in the instant case constitutes a violation of 2518(8)(d). Their conversations had been intercepted and they were under serious investigation for possible indictment. Had the judge known of their capacities in this conspiracy he would have required them to be served with notice. His lack of knowledge came about as a result of the government's failure to disclose that information to him. He was denied the opportunity to even exercise his discretion which violates both the spirit and letter of 2518(8)(d), and the evidence seized thereby must be suppressed. Two Circuits have recently examined this issue with the same result. U.S. v. Chun, 503 F.2d 535, 540 but see 536 et sec.; U.S. v. Donovan, 513 F.2d 337, 342 et sec. citing Chun, supra, cert. granted 1975.

In addition this intentional failure to afford notice to the Schwartzs' placed the government in a position where it had gained a tactical advantage over them. Without knowledge of the government's actions directed against them they were substantially prejudiced when the government in 1974 indicts them for these violations. Their ability to marshal facts concerning their activities during this period in 1970 was severly hampered as was their memory; their ability to gather witnesses to corroborate their activities was severly hampered by disappearance, death, change of circumstance as was their ability to gather witnesses against the present government witnesses. In short their 5th Amendment right to due process was lost. This prejudice is more fully discussed in the portion of the brief dealing with "Pre-Indictment Delay", infra.

There is absolutely no doubt that Robert and Dafney Schwartzs' conversations were intercepted during 1970; that they were under serious investigation for illegal narcotics activities; they were named before,during and after the tap by Estrada as persons involved in the "Fantuzzi" conspiracy with particular information as to their activities already in the government's hands. The government conceeded this

in the instant case (2724,2726). The court's attention was specifically called to the Chun opinion on the trial as well as the deception upon Judge Wyatt(1943-44).

B. SUBMISSION OF DISPUTED TRANSCRIPTS TO THE JURY OVER OBJECTION WAS REVERSABLE ERROR BY THE TRIAL COURT

The discovery in this case was supplied in such piecemeal fashion that the first opportunity to fully examine the tapes and transcripts was during the trial itself (894-904, 600 , 1419-20, 1428-29 etc.). At the trial serious discrepencies regarding the tapes arose as they were reflected in the present government transcripts when compared with the old "Fantuzzi" transcripts. These serious differences were called to the court's attention on several occaissions(1419-20, 1427-29,2266-68 2270-74 etc.). The court simply accepted the government's new version, over objection. During the deliberations the jury requested the various conversations on the tapes where the Schwartzs' were mentioned and the court decided to send in the present government transcripts. Defense/objected to sending in only the government's version claiming that in truth the contents of the tapes was different from what was reflected in the government's transcript. At first the court seemed to agree until the government objected and then the court said it would send in only the government's present version, even though the defense suggested sending in both versions. The jury had been deliberating for many hours and the transcripts took on added importance at this time. The court refused to submit the versions of both sides; nor would the court even tell the jury there was another version available if they wanted to look at it.(2809-16). In cases where the defense and prosecution disagree as to the contents of of the tape the proper proceedure is for the jury to receive both sides versions. U.S. v. Carson, 464 F.2d 424,436-37; U.S. v. Bryant, 480 F.2d 785, 791 n.4. Although timely objections were made to the tapes throughout, the court never attempted an in camera examination so as to examine and compare the tape contents

with the transcripts and no ruling of waiver was ever made. That the questioned tapes were in a foreign language was even more reason for extra care as to disputed transcript translations. Even the court at 2814 tells the jury" That was a spanish tape , so you have to rely on the(transcript) translation unless any of you understand spanish."

C. THERE WAS NO MINIMIZATION AS REQUIRED BY 2518(5) EVER EMPLOYED OR CONTEMPLATED

The monitoring equiptment in the"Fantuzzi" case was installed by agent McCarthy, who testified on this trial that he instructed the monitoring agents on its use but never told them of the statutory need for minimization and that if they were so instructed he had no knowledge of that fact. He was at the plant every day during the pendency of the tap. Agent Dugan allegedly conceeded in"Fantuzzi" in 1970-71 that there was no minimization regarding this wiretap.

The trial judge in the instant case was the same judge before whom U.S. v. Fantuzzi, supra was tried in 1971. It is perhaps instructive at this point to briefly indicate the proceedure used in this tap. Averbatim record of all conversations was made by use of the tape machine; in addition there were spanish agents around the clock listening and making the log; when the reel was completed it was taken by Dugan to where is was transcribed and a copy of the tape made.

Therefore every call that came over that phone was both recorded and monitored and logged by a brief synopsis of the parties and the nature of the call. In 1970 when this tap was on there had notyet been the intense litigation regarding wiretap applications that came in succeeding years and from the pure practical consideration that one must not loose sight of in viewing the actions of agents in 1970, there was no minimization employed or contemplated.

Nevertheless when the issue was raised before this trial court the matter

of a hearing regarding minimization and the other wiretap issues was set for consideration post-trial, over the objection of the defense. No such hearing was scheduled as promissed which resulted in motion seeking one before the imposition of sentence herein. The court did not schedule a hearing and on the day of sentence simply stated that it had reviewed the log book and denied the motions. The court's action was at best erroneous under this conceededly illegal wiretap proceedure. If anything the log indicates that every call was monitored and recorded. The best evidence of what the agents were hearing and recording was the tapes. However, even looking at the log one can readily see many conversations not related to this investigation. The many interceptions of the calls of Mrs. Callejo, an attorney from Texas, especially those directed to Kitty who was her client, was a clear indication that even the attorney-client relationship was to be invaded in a vain attempt by the agents to salvage their blunder in Texas.see U.S. v. Fantuzzi, supra at 686. The court's failure to hold the hearing promissed on minimization and the other wiretap issues was simply an expedient method of leaving an unpleasant task to the court of appeals for it is clear that there was an intentional flouting of the statute in Fantuzzi and suppression was mandated thereby, U.S. v. Eastman, 465 F.2d 1057. Neither U.S. v. Manfredi, 488 F.2d 588 nor U.S. v. Bynum, 485 F.2d 490 are applicable here.

POINT III

PROSECUTORIAL DELAY IN SEEKING THIS INDICTMENT HAS PREJUDICED DEFENDANT'S FIFTH AMENDMENT RIGHTS TO A FAIR TRIAL REQUIRING DISMISSAL OF THE INDICTMENT

In United States v. Marrion, 404 U.S. 307, at 324 the court states:

" Thus the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused. Cf Brady v. Maryland, 373 U.S. 83; Napue v. Illinois, 360 U.S. 264 "

We incorporate herein, as though set forth at length, the arguments made regarding the total absence of inventory notice under the wiretap Point infra.

The government knew, through their informant Estrada, that the Schwartzs' were part of the "Fantuzzi" conspiracy since April, 1970. Thereafter they had been overheard and intercepted on the "Fantuzzi" wiretap. In 1970 an indictment was obtained in the Eastern District, naming amoung others one James Christian (Bruno) . see U.S. v. Fantuzzi, supra 463 F.2d at 684. The evidence against Bruno was less than that against the Schwartzs' and yet he was indicted. He was not even overheard on any wiretap, nor were there any conversations with Bruno and any of the informants' regarding narcotics. It thus becomes clear that the government's action in failing to arrest and seek an indictment against the Schwartzs' in 1970 was deliberate and intentional conduct on their part. There is no question that with Estrada and the wiretaps the government had sufficient probable cause in 1970, not only to arrest and indict the Schwartzs',but if believed,to convict them as well. It was certainly enough in U.S. v. Fantuzzi, supra.as tothe defendants therein.

Probable cause to at least arrest, was thus clearly established in 1970 and in fact was admitted by the government on this trial when Mr. Schlam told the jury:

> "In 1970 when the Fantuzzi case was presented what was the evidence against Mr. and Mrs. Schwartz ? Carmen Estrada plus the evidence from the wiretap." (2724,2726)

There was no active investigation of the Schwartzs' in the 4½ years from the events in 1970 continuing to the indictment. Cipriano's affidavit in the search warrant application discussed infra. makes that clear beyond peradventure. This was not an involved or complicated crime involving investigation of the magnitude required with S.E.C. swindles or consumer fraud cases so as to justify the passage of 4½ years in order to ferrit out culpable individuals. This was a simple crime, by comparison, and the Schwartzs' had already been identified and informed on by Estrada and the tapes as participants in 1970. See. U.S. v. Marrion, supra at 333-335, Douglas,J..

The only excuse offered the jury, by the government for the delay was the statement by Mr. Schlam :

"To have a case you have to have witnesses. If there are no witnesses you don't have a case." (2724)

He then went on to tell the jury that all the government had in 1970 was Estrada and the tapes and asked the jury to consider the type of evidence necessary to sustain the government's burden and they would know from that burden and from the dates when it's witnesses materialized why it wasn't presented in 1970. Proper exception was taken to this statement(2726) as being contrary to law, but it was also factually false unless the government is ready to concede that they were actively soliciting the testimony of these people, which they vehemently denied throughout the trial.

In addition to the foregoing the defendants' suffered actual prejudice in that prospective defense witnesses were lost, disappeared, had died or had been interfered with by the government in the following manner:

a. Jose Landetta a/k/a Pepe(Jose). The defense called upon the government to produce Jose, the other government informant in U.S. v. Fantuzzi, supra at 685 etc., whose last known address was,in the protective custody of the government of the United States. Mr. Schlam represented that the government didn't know where he was. There was a real interest in having Jose as a defense witness in the instant case especially because of his sworn testimony in U.S. v. Fantuzzi, supra.; his total familiarity with the events, persons and their activities in 1970; his sworn testimony that Lucho had this big deal with Bruno and Claudine and if there was anything left over Lucho would give it to Jose to sell(U.S. v. Fantuzzi, supra at 686) which casts enormous doubt on the government's present theory that the Schwartzs' were negotiating for part of that Texas cocaine; that the trips to Texas for the cocaine would be shown to be frivilous regarding the Schwartzs' and the question of venue

in the Eastern District (see Varience Point, infra).

That Jose was present after the Texas arrest and prior to the Fantuzzi arrest in June,1970 ; that he manned the telephone after Lucho and Kitty went to Texas and would know about an alleged list of Lucho's customers which was left and whether the Schwartzs' names appeared thereon;and what happened to the list which may have been given to Dugan by Estrada which he can't recall; that he met with Lierros both before and after Texas and again after the "Fantuzzi" arrest on June 15, 1970. All of the facts made it essential that the defense at least have the opportunity to interview him regarding his knowledge of the persons and the events. (828, 1554, 2147-49, 2292 ; 2293, 2333)

b. James Christian (Bruno):acquitted defendant in"Fantuzzi"supra , presently sentenced on other charges and facing possible additional charges as a result of the testimony of Lierros in the instant case; use and interview lost through 5th Amendment claim (1975-83).

c. Richard Wheeler: customer of Lierros allegedly through Bruno; familiar with the actions of some of the "Fantuzzi" defendants and the events in 1970 is dead.

d. Andres Rodriguez: present throughout most of the "Fantuzzi" transactions with knowledge of all of the parties involved and their respective roles in 1970 who according to Lieros made deliveries for her to the Schwartzs' during 1970. Also present at Kitty's apartment on many occaisions with Lucho, Fantuzzi, Estrada etc., during this conspiratorial period. Although the defense made every effort to locate him, he cannot be located at any address furnished so that the Marshal can affect service of a defense subpoena. (1099-1102, 1322-1323, 1794; 1982-83)

e. Carmen Lopez (Kitty) : a convicted defendant in "Fantuzzi" who had completed her sentence therein and appeared in court on March 24, 1975, the date originally set for trial in this case, (2130). At that time she was interviewed by Mr. Krieger and Mr. Epstein the attorneys' for the defendants' and informed them

that Mr. and Mrs. Schwartz had nothing to do with the "Fantuzzi" defendants and their narcotics activities. That she had been brought to the U.S. Attorney's office where she was told that she along with Lucho had made a delivery of 2 kilo's of cocaine to the Schwartzs' and that they wanted her to testify to those facts. That she informed them that this was false and never happened and anyone who said that was lying. Mr. Krieger made these facts known on the record (2130-31). Mr. Schlam's response while admitting she was there, states it was only for 20 minutes wherein she stated that she didn't want to cooperate (2132). The defense had sought the address or whereabouts of Kitty from the government since the middle of the trial (1790) . At 1795-1796 Mr. Schlam states agent Dugan has her address and will produce it tomorrow. However, when Mr. Schlam wants to contact her he calls Mr. Rosencranz, her attorney,who makes her available or tells Mr. Schlam she is not available.(This certainly indicates a more than passing contact with the government and Kitty that Mr. Schlam relates at 2132.) Mr. Schwartz during this time tells the court of her appearance on March 24,1975 and of the fact that a couple of agents approached her in the courtroom and suddenly she was gone. At this point the court tells Mr. Schlam to see if he can get her again. Thereafter, an attempt was made to get immunity for Bruno (1975) and Kitty(1977) because of Fifth Amendment claims. The court directed Mr. Schlam to inquire of Mr. Trager who later reported no immunity would be applied for,(but see State v. Broady, 16 Cr L 2387). Thereafter, it became apparent that Kitty had been threatened by the government (Mr. Schlam) through her attorney Mr. Rosencranz(2290-91, 2335-43).

The government's handling of Kitty can only be viewed as prosecutorial misconduct for any effort to suppress,/ pressure or influence the testimony of any prospective witness whether directly,or through her attorney, comes dangerously close to endeavoring to influence a witness in violation of 18 U.S.C. 1503,(see also 18 U.S.C. 241). The court's statement (2342) that to point out to somebody there are still crimes not barred by the statute of limitations may be a type of pressure that is questionable, simply shows a lack of understanding of the facts. It was the court who directed the

government to produce her in the first place (1796) . Kitty was already a convicted defendant in"Fantuzzi". To threaten her with further prosecution for narcotics involvement if she didn't cooperate with the government in this case against the Schwartzs' was a calculated attempt to get her,either, to be a witness for the government or to insure that she didn't testify favorably for the defense. The defense was severely prejudiced by this action.

> " The right to offer the testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense, ... This right is a fundimental element of due process of law." Washington v. Texas, 388 U.S. 14, 19.

Numerous statements were made to the court regarding continuance and at the end of the trial, where the court directed us to, when an application for a continuance was made, it was denied (2511). At the same time a previous application to introduce Jose's testimony from U.S. v. Fantuzzi, supra. into the record of these proceedings was denied (2517-18).

The defense in the instant did not seek the empty exploitation of the absence of informant's and witnesses ; made real efforts;to locate potential witnesses ; to interview potential witnesses and use them on the trial; to seek immunity for potential witnesses who were under threat of further prosecution ; and to expose government pressure on witnesses.

This case proves one thing conclusively. Informant's are "Brahmins" when the government wants them to be. The government will provide, in the case of Estrada, continuous, controlled pasture along with ample funds to insure availability. Estrada was placed in a funded protection program for 2 years where she was paid and, in addition, given substantial monetary rewards from which she purchased her present home. The government knew where she was and knows where she is to date. In the case of Jose who faced the same danger, the government does not know where he is. It is obvious why the government didn't want him around.

In addition, like"Roviaro" this was a case involving violations of Title 21 U.S.C. 173 and 174 with the attendant statutory presumption. This added burden " emphasizes the need for access to any material witness"(Roviaro v. United States, 353 U.S. 53) which the government must have known when they severed relations with Jose. His importance in any future contemplated proceeding could not have escaped the government's attention.

It would be a sham for the government at this juncture to attempt to demonstrate that the reason for the delay in this case was due to legitamate consideration in law enforcement. U.S. v. Briggs, 457 F.2d 908,911.

That the informant Jose (2148) was not available, is a fact the government must accept responsibility for and this made it impossible for the Schwartz' to be granted a fair trial. U.S. v. Norton, 504 F.2d 342 . Jose by his sworn testimony given at the Fantuzzi trial (Fantuzzi trial transcript, pp 282,306) would have presented exculpatory evidence as to the Schwartzs' involvement with Lucho and the others in any Texas conspiracy or trips to Texas for bail. U.S. v. Fantuzzi, supra at 686. At the very least they were entitled to interview him concerning his knowledge. The government must bear the burden of demonstrating that as an informant he did not possess exculpatory evidence which they failed to do. U.S. v. Ferguson, 498 F.2d 1001; citing U.S. v. Ketchen, 488 F. 2d 575; U.S. v. Barnes, 486 F.2d at 780.

" If witnesses die or disappear during a delay the prejudice is obvious" since a defendant is thereby hindered in " preparing his case." Barker v. Wingo, 407 U.S. 514, 532."The informants testimony was highly relevant and might have been helpful to the defense." Roviaro v. U.S. supra 353 U.S at 63,64. " On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law." Dickey v. Florida, 398 U.S. 30, 38; Harrion supra at 331, Douglas,J.concur. n.3 and n. 4; 333, 334 .

POINT IV

THERE WAS A PREJUDICIAL VARIANCE BETWEEN THE INDICTMENT AND THE PROOF REQUIRING DISMISSAL OF THE INDICTMENT

The indictment herein was secured by presentment to a grand jury in the Eastern District on December 10, 1974. It charges Robert and Dafney Schwartz (joyce) as the sole defendants' in a single count, with Conspiracy ; within the Eastern District:

a. to import heroin and cocaine, and

b. to buy, sell or facilitate the transportation and sale of heroin and cocaine, and

c. to conceal the existance of the conspiracy

from November, 1969 to April, 1971, in violation of Title 21 U.S.C. Sections 173 and 174 (the"old law", which ended April 30, 1971) . see Appendix

In the grand jury the government presented Lucho (Morales) who testifies to conversations with Mr. Schwartz regarding the possible purchase, in futuro, of 10 to 15 kilos of cocaine, expected in a week or two in Manhattan (Overt Act 1).

Thereafter Lucho met Juan Besolo, who asked him to sell a quantity of cocaine (5 Kilos) for him and Lucho agreed. Lucho received this cocaine from Juan Besolo and Mario Sepulveda at the apartment of Celso Borgono (2 kilos) in Manhattan. That Lucho delivered this cocaine to an address in Manhattan where he sold it to the Schwartzs' in May of 1970, (Overt Act 3) .

" Overt Act 2" of the indictment states: " That on or about May 12, 1970 co-conspirators Besolo and Borgono received a quantity of cocaine in Brooklyn, N.Y.."

Further particulars were requested regarding Overt Act 2 and the government responded that " the cocaine was received in the vicinity of the Chilean Line Pier, Columbia Street, Brooklyn; the time of the receipt was approximately between midnight and 1:00 A.M. "; " Approximately on May 12, 1970."

The government also supplied the relevant portions of the log book for the

S.S. Imperial for May 11 and 12, 1970 and the arrest record of One Celso Borgono. The five other listed overt acts were all within the Borough of Manhattan, in the Southern District of New York. Obviously, the proof at trial was to be that Besolo and Borgono received a quantity of cocaine in Brooklyn, N.Y. from a Chilean vessel, the S.S. Imperial, upon which the cocaine had been brought into the United States.

The government had laid before the grand jury three essential elements for their consideration and vote regarding this indictment:

1. The cocaine had been imported into the U.S. upon a foreign ship;and
2. The cocaine was removed and received from the S.S. Imperial in Brooklyn, N.Y. on May 12, 1970, in furtherance of this conspiracy; and
3. This cocaine was then brought to Manhattan and subsequently transfered there to Lucho (Morales) which he in turn by two deliveries (Overt Acts 3 and 5) sold to the Schwartzs!; and

Therefore venue to prosecute this indictment would be properly laid in the Eastern District of New York.

It is clear that the jurisdiction of the grand jury is co-extensive the jurisdiction of the court of which it is an appendage and an Eastern District Grand Jury cannot vote indictments in the Southern District of New York. Hale v. Henkel, 201 U.S. 43,55 . Additionally 28 U.S.C. 547 limits the prosecutorial power of the U.S. Attorney to crimes committed within the boundries of his district and neither he nor his assistants have jurisdiction to act for the United States in another district. see U.S. v. Winston, 170 U.S. 522; Nessy v. U.S. ex rel Frad, 89 F.2d 866.

Venue in criminal cases has been historically and uniformly held to be an issue of constitutional proportions and it is essential that the government lay before the grand jury valid and clear evidence that would justify the trial of that matter within that judicial district. 6th Amend. U.S. Const.; U.S. v. Johnson, 323 U.S. 273, 276 ; U.S. v. Anderson, 328 U.S. 699,703 .

The grand jury must specifically vote the indictment on the facts submitted and they mustspecificaıly deliberate both the finding of the indictment and the trial thereof within the Eastern District of New York. It is important to repeat that the evidence presented established "venue" by the facts that became "Overt Act 2" and there was not a scintilla of evidence presented regarding anything else occurring within the Eastern District. In fact all of the other overt acts were specifically presented as occurring within the Southern District of New York.

Upon the trial of this indictment the government offered evidence relating to every overt act that ocurred in the Southern District (Manhattan) but no evidence whatever was presented this jury, regarding "Overt Act 2",and none of the men who appeared before the grand jury relative thereto was called as a witness on this trial.

Where the government chooses to proceed in a certain district in a doubtful case of venue, when venue in another district is clear, the government must be held responsible for the affects of it's election. Petition of Provoo, 17 F.R.D. 183, aff'd. 100 L.Ed. 761 . It is also clear that an indictment only alleges proper venue when it alleges facts which if proven would sustain venue. U.S. v. Bohle, 445 F.2d 54, 58 ; 1 Wright, Federal Practice and Proceedure. As an example, this Court in U.S. v. Nathan, 476 F.2d. 456 at 461-462 n. 16 responding to a venue attack, denied relief because the indictment therein specifically refered to two flights from Kennedy Airport, listed in the indictment and proved as overt acts. No such flights were listed in the instant indictment nor presented to the grand jury that voted it, although the government attempted to have the court allow the indictment to be amended by the elimination of "overt act 2 " and the substitution of some questionable proof of the use of Kennedy flights . This led to arguments during the Rule 29 motions (1988 to 2008) that jurisdiction had not been proved and that the indictment had been changed without re-submission to a grand jury, in violation of law.

The government conceded (2003) " in respect to the overt act" .....(a) "the cocaine which we allege was delivered to Mr. Schwartz came off the ships in Brooklyn, N.Y.." and that at least(b.)" Celso Borgono" testified to these facts before the grand jury, (2008) .

The court did not dismiss the indictment even with knowledge that there certainly was ample time for the government to supercede before trial but decided the issue by striking "overt act 2" from the indictment, over objection. Even the continuance request was denied, at the end of the trial. The court decided to make the Kennedy flights a jury question specifically reserving to the defendants' their general objections to it's actions and exceptions to the adequacy of it's charge in that regard (see generally 2531, 2533, 2541).

This court has recently had occasion to adopt the well reasoned opinion of Skelly Wright, J. in Gaither v. United States, 413 F.2d 1061, in several cases where as here there is erroneous departure from the original indictment. The following language from that case is instructive:

> " The strictness of the Bain rule (Ex parte Bain, 121 U.S.1) against amendments has been avoided by a simple prosecutorial expedient. Rather than amend the terms of an indictment the prosecutor simply proves the facts which the amended indictment would have charged. Thus instead of an amendment there is a variance. And the accepted rule is that a varience does not call for dismissal of the indictment except upon a showing of prejudice.
> The Stirone case (Stirone v. U.S., 316 U.S. 212) limited the use of this device where the variance is substantial enough to amount to a constructive amendment of the indictment and relied upon Bain in ordering the indictment dismissed. The reason was not notice or jeopardy but rather that the variance infringed his ' right to have the grand jury make the charge on its own judgement',(Stirone at 218-19). "
> Gaither v. U.S. supra at 1071-72; see also Russell v. U.S., 369 U.S. 749,771.

The amendment in the instant case or the variance as semantics dictate was the elimination of the issues presented to and considered by the grand jury in voting this indictment which became Overt Act 2 by the substitution of the judgement of the court and prosecutor which is universally condemned. Bain, Stirone, Russell supra..

This was not the elimination of mere surpulsage. The question of importation, venue and the receipt and transportaion of drugs were serious factors affecting the minds of the grand jurrors as they deliberated this indictment. To allow the prosecutor and the court to say what the affect of elimination of this proof would have is to make a mockery of the system. The proof at the trial varied from the indictment in such a manner that, at least on the vital issue of venue, it was constructively amended and thus the conviction was reversable per se regardless of whether the Schwartzs' were prejudiced. See Gaither, etc., supra.

In this case we have prejudice as well from the action of the prosecutor adopted by the court. The prejudice is apparent from simply reading this court's opinion in U.S. v. Fantuzzi, supra. (463 F.2d 683). If Jose Landetta, a crucial informant witness, were available the defense would have been able to establish that the government's new venue theory (The flights to Texas were in furtherance of this conspiracy (2744)) was a sham . It was clear that in 1970 Lucho had completed this big deal in Texas for all of the cocaine with Bruno and Claudine and if there was anything left over Lucho would give it to Jose to sell and that the trips made to Texas for the purposes of bail had nothing to do with any alleged conspiracy involving the Schwartzs'. U.S. v. Fantuzzi, at 686 ; see Point III supra. and the absence of Kitty, Rodriguez, etc., as well.

The real answer to the elimination of proof of "Overt Act 2" by the government was in the hands of the Hon. Orrin Judd on November 14, 1975, for on that day under docket no. 75 C 1808 an application came on before him by appellant herein, establishing that the facts presented by the government, that constituted Over Act 2 in this indictment was a fraud on the grand jury, to secure an indictment in the Eastern District. Those allegations set forth the following facts: .....

> "in 1972 Mario Sepulveda testified under oath before a grand jury in the Eastern District, as a government witness, that on May 11, 1970 he had a conversation near the Brooklyn waterfront wherein

he was informed that the S.S. Imperial docked there was being watched closely; and
That on May 12, 1970, Sepulveda personally along with a man named Bobadilla (not Besolo and Borgono) boarded the ship in Brooklyn, N.Y. and received and removed 6 packages of cocaine.
None of this cocaine was delivered to Besolo and Borgono(or for that matter Lucho) and documentary proof of these facts will be presented to the court that hears this petition."

This was followed by additional arguments and resulted in the following:

" It is a simple matter for the government to admit or deny whether:
a. Mario Sepulveda, Juan Besolo or Celso Borgono were ever called before the grand jury in the instant case, and whether
b. the grand jury received testimony from some or all of these men regarding "Overt Act 2" of the indictment, and to produce this grand jury testimony for inspection."

The government (Mr. Schlam) although notified in writing by the clerk since November 7, 1975 that the matter would be on November 14, 1975, never appeared or responded. Judge Judd, never sought any response from the government, nor scheduled any hearing but simply equated this to the venue issue raised on trial, and said tell it to the Court of Appeals since the matter was on appeal. A motion for re-consideration was filed on November 28, 1975 seeking only a response from the government regarding the allegations stated above and reminding the court of the continuing duty of the government to disclose exculpatory evidence. On December 10, 1975 by further order the court simply stated that appellant was premature in his application and the proper forum was the Court of Appeals at this time.

In this regard the court's charge (2763) is instructive for the court told the jury that the government has a duty to produce evidence that would tend to show that a defendant is not guilty. While this was a prejudicial statement in the manner given since it implied at the time that if the government doesn't furnish reports or other documents it means they are not exculpatory (See Point V, infra.). It is indeed strange that the court would continue that attitude when presented with facts that demonstrate otherwise. The government's (Mr. Schlam's) failure to respond is obvious. In any case we have raised the issue to the Court of Appeals.

A. THE COVERING OVER OF " OVERT ACT 2" BY THE COURT AND THE SUBMISSION OF THE INDICTMENT TO THE JURY WAS REVERSABLE ERROR

When the court struck"overt act 2"from the indictment (2533) it was without the consent of Mr. Schwartz (2541). In any case, during the deliberations there came a time when the jury asked for the indictment to use as an aid, which the court had previously told them about in his charge. Prior to sending it in the court did not order a retyped " clean " version, nor did it order a photostatic copy made with " Overt Act 2" covered when the copy was made so that allegation would no longer appear on the indictment. It was simply covered over with a piece of paper and the indictment sent in to the jury, who were later instructed (2791) " You asked for the indictment and I have the original. There was one of the overt acts I omitted in reading. There was no proof of it. I covered that over." If anything, this was inherently prejudicial since to covering of the deleted words coupled with the instruction given only served to arouse the jury's curiosity and stimulate unwarranted speculation as to the full scope of the original allegation which was available to any jurror who simply lifted the paper cover and looked underneath. U.S. v. Cerami, 510 F.2d 69 . The minimally accepted procedure should have been for the court to tell the jury in advance that it was deleting a portion of the indictment and then at least have a photostatic copy made with the deleted words covered over so they would not appear thereon and no jurror would be able to see them. In this case they were not even told that they could not look at what was under the paper.

B. THERE WAS A PREJUDICIAL VARIANCE IN THAT A SINGLE CONSPIRACY WAS CHARGED AND MULTIPLE CONSPIRACIES PROVED

The proof at trial was that Lucho with no prior contact with the Schwartzs' and no cocaine available talks of a possible future deal for 10 to 15 kilos of cocaine. This of course is not an agreement but a state of mind without any act to bring it about, and has nothing to do with Mr. Besolo. Thereafter Lucho chances upon Besolo and is offered a quantity (5 kilos) of cocaine to sell for Besolo,

and then the first (overt act 3) sale of 2 kilos takes place. Besolo is a "connection" with different principals, sources of drugs, methods of importation and distribution points. He does not join the " Fantuzzi" group and their is no evidence of any prior dealings. U.S. v. Miley, 513 F.2d 1191 ; U.S. v. Butler, 494 F.2d 1246,1255.

Lucho then chances upon his old friend Pineda, one of Besolo's men and they agree to sell together, 3 kilos of Besolo's cocaine (overt act 4). The future 10 kilos Pineda proposes to the Schwartzs' is supposed to come from Besolo (overt act 5).

To this point the conspiracy is solely Besolo, Lucho, Pineda together with the Schwartzs'.

Thereafter Lucho goes to Texas on a different thing (938) concerning the "Fantuzzi" conspiracy. It is thus clear that there are different sources, principals methods of importation etc., . Besolo and Lucho are not partners nor are they dependent upon one another. When Lucho returns after his problems in Texas (see U.S. v. Fantuzzi, supra) he does not re-unite with Besolo in the cocaine business. What you had, in truth, was two different conspiracies operating in the same time frame but each different and unconnected.

In spite of the fact that agents are all over the place following the "Fantuzzi" people everywhere after Texas(which they are all aware of) Lucho decides to move the Texas cocaine and claims he goes to the Schwartzs' and tells them to get their money together for he will be ready for them soon. Then the "Fantuzzi" arrest on June 9, 1970, and everything is aborted.

The proof to this point was of 2 separate conspiracies with only Lucho connected to each, rather like Mr. Brown in Kotteakos. There was just not sufficient nexus to link these two conspiracies to a single overall conspiracy. U.S. v. Kotteakos, 328 U.S. 750, 773-74. There was nothing to indicate these two groups were conducting a "loose knit" business on a regular or steady basis. All of this is further complicated

by the Lierros testimony (1085) of two alleged sales of heroin, offered as being part of the one overall conspiracy charged. These sales occurred in July, 1970, weeks after the"Fantuzzi" case arrest of Lucho, Fantuzzi etc., . Involved a drug that both Lucho (692-93) and Lierros (1151) didn't really deal in.

Based upon the foregoing you have proof, not of a single overall conspiracy, but of several smaller conspiracies which is a material variance. The question then becomes whether the Schwartzs' were so prejudiced by this variance as to be entitled to a reversal of their conviction. U.S. v. Berger, 295 U.S. 78,82 ; U.S. v. Kotteakos, supra; U.S. v. Miley, supra at 1207, Fed. R.Crim.P. 52(a). In that regard the main concern is the spill-over affect or transference of guilt from one conspiracy to another. In the case of "old law" violations charged herein this is exactly what happened. The court charged the jury(2741) that possession of heroin per se and large amounts of cocaine allowed the jury to infer importation with knowledge(see 2771). The very nature of this multiple conspiracy evidence when joined under the single overall banner prejudices the Schwartzs' in the minds of the jury. If these alleged heroin transactions are confined to their separate conspiracy. They would only be admissible under a"post conspirtorial act" theory that sheds light on the intent or state of mind of the parties and not for the truth of the facts contained therein, which would be clearly established by limiting instructions. In the instant case it came in for it's truth. Compare Anderson v. U.S., 417 U.S. 211 with U.S. v. Krulewitch, 336 U.S. 440,443. If these other crimes were relevent to prove the existance of the single overall conspiracy charged than the presumption charged the jury regarding possession of heroin was per se prejudicial,(see U.S. v. Torres, 519 F.2d 723 ; U.S. v. Mallah, 503 F.2d 971, 981.) and should never have been given.

The only other matter which must be brought to the attention of this court regarding variance is the question of the charge/concealment of the conspiracy in this indictment.

The single overall conspiracy count also contained a charge of an actual agreement to conceal the existance of the conspiracy as a part thereof. There was not a scintilla of proof offered to sustain this allegation on the government's case. There is no such thing in law as an implied conspiracy to conceal from circumstantial evidence without specific proof of acts of concealment in furtherance of the agreement. Gruenwald v. U.S., 353 U.S. 391, 399 et sec.. In spite of this these allegations survived the Rule 29 motion at the close of the government's case and went to the jury with this indictment. This was plain error (F.R.Crim.P. 52(a)) and prejudicial especially in light of the court's "misprison" charge (see Point V, infra) given to cover an alleged statement of Mr. Schwartz to agent Bocchichio which had nothing to do with the allegation in the indictment.

Note. This Brief has purposely refrained from attacking the evidence not because it was overwhelming but because the sufficiency of the government's evidence can be reduced to a single word.... Credibility..... which was the real issue in the case. This is best reflected in the many hours of jury deliberation, whose verdict would have been different had we been afforded a " fair trial".

This material was requested with the greatest convenient speed as the case was set for March 24, 1975 for trial.

The request, did not, as in Reagen (U.S. v. Reagen, 465 F.2d 165)/ seek investigative records already in the possession of a foreign court but sought the foreign court to compel the sworn answers to proposed interogatories. In short, judge Judd acting on behalf of the United States District Court, had made certain findings of fact and then in the manner of a "grand inquisitor" asked another court to get him proof of what he claimed he already knew. By his actions he sanctioned a breach of the attorney-client privilege without ever giving the subjects of his investigation a chance to be heard.

This then sets the stage for the frame of mind that he was operating under while judging these crucial pre-trial motions and proceedings, not based upon what he was learning in an advesary setting but what was being furnished to him in some secret proceedings.

The "Requests", for their were two; one handled orally without any record of the proceedings; one on the affidavit, I believe of Mr. Schlam, led to the conclusion, alibiet guarded, that the court had already concluded the Schwartzs' drug involvement and that money was coming into the case as post conspiratorial acts before the trial had even gotten under way, (610, 609-12, 737-38). It was not the fear of the action taken that caused concern but the disregard of any attempt to search for the truth. The at page 750 of the record because the impartiality of the court was seriously questioned (746-50) the first motion for recusal pursuant to Title 28 U.S.C. 455 was made.

The newly amended section now provides that a judge shall disqualify himself in any proceeding in which"his impartiality might reasonably be questioned." This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for

doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case ..... removing the so called"duty to sit." S. 1064 Report No. 93-1453, House Committee on the Judiciary. The legislative intent found in the Senate and House hearings was originally directed to the adoption of the Single Preemtory Challange Rule under which a party, without cause can seek a different judge by the simple exercise of his one challange. This proposal was eventually compromised to the present amendment which allows the parties and not the court, to decide based upon factual evidence, when "his impartiality might reasonably be questioned," by removing the phrase "in his opinion" from the old section. S.1064, Committee on the Judiciary, U.S. Senate-Hearing Subcommittee on Improvements in Judicial Machinery. To broaden and clarify grounds for Judicial disqualification. 7/14/71 and 5/17/73.

The recusal motion was not idly made, nor was it done as any form of sour grapesbut upon sound evidence and practical considerations that ex parte sources of information and the erroneous, sua sponte, use of collateral, non-criminal sources of information as a credibility yardstick had reasonably affected the impartiality of the judge, requiring him to remove himself, (746-50). Michalson v. U.S., 355 U.S. 469,482; Gregg v. United States, 394 U.S.489at492; Berger v. U.S., 255 U.S. 22,34-35.

No affidavit was required on this motion, properly made and supported by facts on the record. It may be that the court was thinking of a motion pursuant to 28 U.S.C. 144 as 455 did not become effective until December 5, 1974. Nevertheless Mr. Schwartz, who was appearing pro se,had,due to his bail being increased before the start of the trial, been remanded to West Street where he remained for the first four days of trial (845-46). Affidavit's were just not practical under the circumstances.

A. IT WAS REVERSABLE ERROR FOR THE COURT TO RECEIVE IN EVIDENCE ON THE TRIAL MONEY, A DEED, PHOTOGRAPHS AND AN AFFIDAVIT OF ROBERT BENNETT SCHWARTZ

The government at trial sought to introduce on it's direct case the following items seized from a safe deposit box on December 27, 1974 (1678-91,see also Point I, infra):

> First. $75,700.00 U.S. Currency.
> Second. a quantity of Jewelry .
> Third. certain documents indicating an estate in Jamaica .
> Fourth. the affidavit of Robert Bennett Schwartz for re-admission to the Bar in November, 1971.

Strenuous objections were taken (1678-91) for it was clear that although the indictment had the boilerplate recitation that the conspiracy terminated in April, 1971, the expiration date of the "old law", the last act proved was in July, 1970 (1085) . Therefore, the money was discovered almost 4½ years after the events; the deed by it's date of November 1973 almost 3½ years, though discovered almost 1½ years later. There is no doubt that in crimes where pecuniary gain is involved, evidence of the sudden acquisition of wealth is admissible to prove criminal misconduct but only where this occurrs at or about the time of the offense or shortly after the conspiracy has ended (1702-03). U.S. v. Kenny, 462 F.2d 1205, 1219 (within the conspiratorial time charged); U.S. v. Tirinkian, 488 F.2d 873 (day of seizure of drugs) ; U.S. v. Bamberger, 456 F.2d 1119.

In United States v. Tramunti,(513 F.2d 1087) relied on by the trial court, the cash was seized in February, 1973,well within the December, 1973 conspiatorial termination charged in the indictment. Therefore the money in Tramunti was admissible as special means to show the doing of the act requiring those means. This is just not the case here. The money was,at best, of questionable relevancy requiring a delicate balance by the trial court whose impartiality was already questioned. Moreover , the placing before the jury of the actual cash (not photographs) was inflammatory and prejudicial. The best evidence thereof is the comment of the prosecutor on summation:

> " 75,000 per se is ---- it is not against the law to have --- all of us, I am sure, would like to have it. However, in trying to determine whether it's innocent possession of a large amount of money or the

proceeds of narcotic trafficing, consider this:
Is it reasonable, based upon your own experience, based upon your own common sense, in an era of rampant inflation to keep 75---
Mr. Schwartz: That is objected to.
The Court: Well it was not a necessary inference. I think it's within the proper area that the prosecutor can mention. I will overrule the objection.
Mr. Schlam: In an era of rampant inflation to keep 75,000 in a safe deposit box. " (2705-06)

This was the result of the court's limiting instruction (1726) the nebulous nature of which was a sound arguement for never allowing the money in the first place.

This court has held that money discovered 47 days after a bank robbery (let alone 4½ years) in the possession of the defendant and admitted for the purpose of establishing sudden acquition of wealth or proceeds, was held to have minimal relevancy after this lapse of time. However, that was not the end of the inquiry since the admission of money for this purpose always raises the substantial possibility that it's prejudicial impact upon the jury would outweigh it's probative value. As this Circuit stated,after a hiatis of 47 days: " Our own answer to the further question, ' Is its value worth what it costs,' McCormick, Evidence 438-39 (1972 ed.) would differ from the trial judge. U.S. v. Fernandez, 480 F.2d 726,739 .

The deed and pictures of a house in Jamaica, taken at the request of the government in 1975 (1933), were objected to as totally irrelevant for the same reasons, stated above. This led to comments by the prosecutor on summation (2706-07) regarding the "form" of ownership which was simply"an appeal to the passion of the jury and to prejudice them." The court's instruction limiting the receipt (1732-33),equally prejudicial was at best,evidence against the admission. In receiving the deed and pictures in evidence the jury was really left with the conclusion, in this case, that it must have something to do with this drug conspiracy otherwise why would the court let it in? It is universally recognized by practicing lawyers, that even proper instructions,and these were not, cannot erase the prejudice caused the defendants' in the minds of the jurrors. Krulewich v. U.S., 366 U.S. 440, 453 and progeny.

The introduction of the affidavit of Robert Bennett Schwartz for re-admission on the government's direct case was substantially prejudicial; not in accordance with sound principle of law and an incredible abuse of discretion when viewed against the reasons given by the court.

The court held (1688-91) that Mr. Schwartz had represented himself to the jury as an attorney in 1970 and that since he introduced the issue, which is just not true, the government had the right to introduce the affidavit on their case in chief. The facts were that it was the government who introduced the issue by the direct testimony of Lucho (669-70) and Lierros(1087-91) wherein they specifically refered to Mr. Schwartz as a lawyer they sought out during this period in 1970. The government permitted and elicited this testimony from them in spite of the fact that the 3500 material of Lierros and other evidence in the government's possession clearly established that they knew Mr. Schwartz had been suspended from practice during this period and was not a practicing lawyer. The theory on which the court allowed this evidence of the affidavit to come in was that it was probative of an issue raised by Mr. Schwartz when the issue was in fact of the government's making. The court allowed the government to put the entire affidavit into evidence and it was read to the jury (1738). This led to renewed motions for mistrial and recusal(1691). No limiting instruction whatever was given the jury at that point, although previously requested, which only amplified the fact that Mr. Schwartz's character was being put in issue on the government's direct case(1688-91, 1996-99). see U.S. v. Byrd, 352 F.2d 570, 575.

On the state of this record, which was of the governments making the affidavit was not relevant for any purpose other than to show Mr. Schwartz was a person of bad character and on balance it's potential for prejudice far outweighed it's probative value, especially with no instruction to the jury whatever. U.S. v. Deaton, 381 F.2d 114, 117 and progeny through U.S. v. Papadakis, 510 F.2d 287, 294. Eight days later during the charge the court (2748-49) states:

" Circumstantial evidence is illustrated on the one hand by the governments presentation of evidence that Mr. Schwartz was not practicing law in 1969 and 1970. That is advanced as indicating that any communication he had with the Fantuzzi conspirators in May and June of 1970 was for the purpose of helping them in their Conspiracy.
But that is not the only necessary inference and not one you are required to find."

The other inference, naturally flowing from this affidavit, is, without something more from the court, that Mr. Schwartz is a person of bad moral character who would be likely to deal with these people and only serves to highlight the prejudice already created.

B. IT WAS ERROR TO CHARGE THE JURY REGARDING MISPRISON OF A FELONY UNDER 18 U.S.C. 4

The indictment charged an agreement to conceal as part of the single overal conspiracy court. No proof whatsoever was introduced by the government to establish this allegation and yet the count survived the Rule 29 motions, and went to the jury. That there is no such thing in law as an implied conspiracy to conceal is clear. Gruenwald v. U.S. , 353 U.S. 391, 399 et sec.;(see Point IV Varience).

Part of the proof at trial involved an alleged statement made under a written agreement of immunity executed by the U.S. Attorney's office and the Schwartzs' (see appendix) the true import of which was never really faced by judge Judd. During pre-hearings
trial/ on the document and it's affects on this trial Mr. Schwartz testified for many hours on the stand and upon compeletion of his testimony not a single question, on cross-examination was put by the government (Mr. Schlam). The court indicated that serious allegations had been made by this testimony which required a response from the government and testimony from Mr. Schlam personally. Mr. Schlam indicated that he would testify but in fact he never did. It was at the conclusion of this hearing that the court in rendering it's decision, sua sponte, went to the suspension proceedings and used the determination therein as a credibility yardstick to find against Mr. Schwartz, (see Recusal Point, infra). This decision was not

by any evidence introduced into the record of the hearing proceedings and was clearly erroneous. Michalson v. U.S. supra at 492.

As a result of this erroneous ruling agent Bocchichio was permitted to testify on this trial Mr. Schwartz had stated that Lucho had offered to sell him 2 kilo's of drugs but that he refused. That when confronted by Mr. Schlam as to whether he reported this to the police, Mr. Schwartz replied. "Well I know."

Thereafter Mr. Schlam on summation told the jury that if Mr. Schwartz didn't have anything to do with this case he would have told the police about the two kilo offer (2698). The court, relying on 18 U.S.C. 4 charged the jury that Mr. Schwartz had a duty to report this to a judge or some other person in civil or military authority of the United States. "Many persons don't perform this duty but you may consider it in evaluating Mr. Schwartz's statement to agent Bocchichio (2754)." This was error, confusing to the jury and prejudicial to the defense. The charge misaprehends the misprison statute which speaks of"conceals" the fact. The authorities are unfform in their agreement that it is not the duty to report that is the condemned conduct but some affirmative act of concealment after knowledge of the facts is acquired, and there was absolutely no evidence of any such conduct by Mr. Schwartz. U.S. v. King, 402 F.2d 694 . Moreover, in the instant case where Mr. Schwartz was alleged in the indictment to be a participant in the crime itself, the giving of the misprison charged violates the Fifth Amendment. see Hoffman v. U.S., 341 U.S. 479, 486; U.S. v. Trigilio, 255 F.2d 385; U.S. v. Daddano, 432 F.2d 1119, 1125, U.S.v. King, supra..

C. THE CROSS EXAMINATION OF AGENT DUGAN BY THE COURT AND IT'S CHARGE THEREON WAS PREJUDICIAL ERROR

Agent Thomas Dugan (the "Fantuzzi" case agent) was called as a witness for the defense (2487-2511). Tapes of conversations between Dugan and Estrada were played; his report from 1971 was received in evidence and he corroborated the fact that Estrada had furnished information regarding the Schwartzs' cocaine participation with the

"Fantuzzi" defendant's before the wiretap application to judge Wyatt (2493). The tapes also showed her continued reporting to Dugan during the wiretap, furnishing better information than the taps themselves and receiving instructions from Dugan. (This butressed the defense's wiretap arguments and pre-indictment delay points already before the court. see Point's supra.) The last three questions put to Dugan - by Mr. Schwartz were crucial on a major issue in this trial, namely (2509-10) Lucho's alleged negotiations in Italian with Mr. Schwartz in 1970. In his report of August 1970, Dugan stated that Lucho Jaramillo and Gino Fantuzzi, speak spanish only. Mr. Dugan confirmed the truth of that statement under oath in this case which cast substantial doubt on all of the government witnesses and corroborated all of the defense witnesses on the Italian issue.

There was nothing confusing about this evidence and it raised a simple issue which the jury could easily follow. At this point Mr. Dugan was available to the government for examination. The government had no questions. The court then entered the "lists" on behalf of the U.S. Attorney(2510) asking questions not based upon any evidence or document of Dugan's produced at this trial to establish that Lucho not only"can" speak Italian but"could"speak Italian in 1970. Followed by " Why didn't you bring an indictment against the Schwartzs' in 1970 ? " (2510-11). Which brought an objection; a remark from the court; a response from Mr. Schwartz and a motion for a mistrial. The emotionalism of this episode cannot be gleaned from the cold record for this was the point at which the defense rested. There was no doubt that the staging of these questions left the impression with the jury that the judge was associated with the prosecution. In his charge he told the jury (2762):

> "You can determine whether Mr. Schwartz could understand enough Italian and speak enough words to agree on the amount of cocaine and price and time of delivery.
> It seemed to me that Mr. Morales (Lucho) spoke more slowly when he was testfying in Italian than when he used spanish.
> If you observed this, you may consider that as bearing on whether

"Mr. Schwartz could understand him.
If you didn't observe it, you can disregard what I have said, because the facts are for you."

and at 2747 after telling the jury the government had 5 years to indict. The court in explaining the delay, states:

" That involved a question of judgement on the government's part as to how conclusive they wanted the evidence before they proceed against a person."

The substance of these remarks, to which proper exception was taken, was to convey to the jury the unmistakable impression that the judge believed Mr. Schwartz was able to speak and understand Lucho in Italian and that the government doesn't bring a case until they have conclusive evidence of guilt. Therefore, the the Schwartzs' are guilty, (see also 1508, where the court tells the jury it was allowing evidence to protect Estrada's credibility).

It is not the business of a trial judge to step into the case to the point where the jury will regard him as being associated with the prosecution. U.S. v. Fernandez, 480 F.2d 726 ; U.S. v. Cuevas, 510 F.2d 848,850. The number of questions asked or remarks alone is not the gauge that a judges conduct has shifted the balance against a defendant since his lightest word or intimation is received with deference and may prove controlling. U.S. v. Fernandez, supra 480 F.2d at 736-37. The high reputation of federal criminal justice and thepolicy of complete and even handed fairness suffer when such conduct on the part of trial judges goes unanswered . The influence of judge Judd upon this jury by his questions, rulings and remarks during the charge,in favor of conviction and in support of the government's case cannot be minimized for his actions necessarily and properly carry great weight in directing the jury's thinking. Whether he simply tells the jury that he believes the defendants guilty or by subtle intimation conveys the same feeling the result on the jury is the same and their verdict will generally reflect his feelings. Quercia v. U.S., 289 U.S. 466,470 ; Starr v. U.S., 153 U.S. 614, 626 ; U.S. v. Fernandez, supra at 737 ; U.S. v. Gruenberger, 431 F.2d 1062, 1067-68 .

In spite of instructions given at trial or during the charge that the jury is the sole judge of credibility or the facts, interference of the judge or the appearance thereof into these areas becomes a factor in the jurys' determination which cannot be avoided, for the impression of partiality cannot be removed or erased. Fernandez, supra at 738; U.S. v. De Sisto, 289 F.2d 833,835 ; U.S. v. Guglielmini, 384 F.2d 602, 605; U.S. v. Brandt, 196 F.2d 653; see also Krulewich v. U.S. supra. 366 U.S. 440, 453.

The conduct of the trial judge when viewed against the broad spectrum of the many issues that finally brought this case to the jury paints prejudice upon the record with a broad brush. It is not surprising that the jury adopted his thinking, for

D. IT WAS REVERSABLE ERROR TO TRY DAFNEY SCHWARTZ IN ABSENTIA TO PERMIT THE GOVERNMENT TO OPEN ON FLIGHT AND TO CHARGE THE JURY THEREON

The trial in the case was originally set for March 24, 1975. However, prior thereto it was determined that pre-trial hearing would run through that date and the 24th was designated or pre-trial hearings with a trial date to be selected thereafter, depending on the outcome. The reason being that if the court granted the relief requested regarding the wiretaps, the government had stated it would appeal and the trial of this case would be postponed indefinitely.

Robert and Dafney Schwartz were husband and wife during the period charged in the indictment and the testimony at trial indicated clearly they were almost always together when the events of May and June 1970 occurred. In plain terms their fates were so inextricably linked that evidence of Mrs. Schwartz's guilt clearly implied the guilt of Mr. Schwartz as well.

On March 31, 1975 while still on pre-trial hearings Mrs. Schwartz failed to appear. Henry E. Petersen, former Deputy Assistant Attorney General was scheduled to testify. The court (480) states:

> "Well she certainly knew about the trial (hearing) this morning. I think I'm going to treat this at least for Mr. Petersen's appearance as a waiver of her attendance."

Upon the completion of Petersen's testimony, the court took a recess to hear a previously scheduled civil matter (510). He told counsel to try to locate her and tell her of her obligation to be here, and he would determine if she waived her appearance for trial as well as the surpression hearing. Thereafter the court commented (518) "well she could have been run over and be in a hospital somewhere, I suppose." Then the court proceeded, in the afternoon session to hear arguments regarding the wiretap and other pre-trial issues that it had been taking testimony on for several days and rendered decisions thereon. By this time is was (575) already 10 minutes of three and the government was suggesting investigating to determine her whereabouts, if, possible. To this point there is nothing in the record to show that Mrs. Schwartz knew the trial was designated to commence on the morning of March 31, 1975. The case was not called for trial nor were there veniremen present. There was was nothing to that point to indicate that Mrs. Schwartz failure to appear was (598) deliberate, inadvertant, foul play, accident or otherwise. This case involved only two defendants and is not what is commonly refered to as a "multiple-defendant" case involving many lawyers, many defendants, with the scheduling difficulties inherent therein. The main government witnesses were in no jeopardy and were,as convicted felons with long sentences expected to remain in custody for a long period of time. In fact some were scheduled to testify in future proceedings yet to be heard in frontof judge Judd. see U.S. v. Tortora, 464 F.2d 1202, 1210 n.7 . It is clear that a trial has not commenced, until the work of empanelling jurors begins (U.S. v. Miller, 463 F.2d 600, 603; Hopt v. Utah, 110 U.S. 574,578) or when the case is specifically designated for trial on a day certain and the case is called for trial at the start of the days business with veniremen present. U.S. v. Tortora, supra at 1206 ; see also Rule 43, F.R.Cr.P.. The trial has not commenced where the court is on pre-trial hearings, with testimony being taken and rulings affecting whether the government would even go foward yet to be made. To this point the impact of any facts

available to the court to determine the issue of Mrs. Schwartz voluntary absence had already been explained away(525). The government (575) suggested further investigation for it was clear that the information presently available did not supply the court with the requisite basis to make such a finding (576). The court did not even attempt to see if any evidence could be obtained by investigation, but ruled that the trial would start and Mrs. Schwartz would be tried in absentia.

Even where a defendant was present at the selection of the jury and does not appear, the proper proceedure is a continuance so that the authorities can gather evidence upon which the court could conclude that the defendant voluntarily absented himself. U.S. v. Miller, supra 463 F.2d 600 at 602 .

A panel was hurriedly obtained and jury selection commenced. There was some doubt as to whether we would even get a panel at that late hour and during the period of waiting the government indicated that it expected to lay proof before the jury that Mrs. Schwartz abscondedat a time when there was not even a scintilla of evidence of that fact;the first of many severance motions (557) was made. This was even before the court had made a ruling regarding flight (572) or trial in absentia (574). Mr. Schwartz who was present was rewarded by having his bail increased to $25,000.00 cash or surety bond which resulted in his spending the first four days of trial as a prisoner in West Street (584). The following day upon completion of the jury selection the government again indicated that it would open on wilful flight (596). This again was before the results of any investigation and the court reduced it's position to " I think your wife was here and is no longer here and you do not know where she is is sufficient evidence of flight for the present time." (607).

The government opened on flight (629), the court instructed (631) and Mr. Schwartz objected and moved for severance and mistrial. He repeated that there was no trial date designated for the 31st of March (632) as we were on pre-trial proceedings and there was only the possibility of trial. There was no response to this by the government then and there was never any evidence offered during trial that March 31,

1975 had been designated as the date for trial (1781-82).

The issue of Mrs. Schwartz's absence and flight became a major factor throughout the trial resulting in;numerous objections regarding the prejudicial affect that evidence was spilling over one to the other; numerous severance motions because of the apparent inability of the court's instructions to cure the prejudice. (599,600,629,631, 1579-88, 1598-99, 1606, 2448-51).

From all of the foregoing and based upon the proof at this trial it was clear that the fate of Robert Schwartz and that of Dafney Schwartz, his wife, were so inextricably linked that by instructing the jury as to Mrs. Schwartz's flight and guilt thereby. The court by it's actions clearly implied the guilt of Mr. Schwartz as well. It is plain in the circumstances here, that practical everyday reality raises the unmistakable inference that a lay jury will not or cannot, follow an instruction that says disregard the wife's obvious guilt, having fled to avoid prosecution and view the husband separately when all of the evidence pointed to joint participation. Such an instruction ignores the practical and human limitations of the jury system. See. Bruton v. United States, 391 U.S. at 135-369. The human mind is not so compartmentalized as to be able on instruction to segregate inextricable guilt and apply it to a particular person as a computer. The inference of Mr. Schwartz's guilt from the courts instruction as to his wife's guilt was clear and practically inescapable. U.S. v. Lobo, 516 F.2d 883 ; Krulewich v. U.S., supra 366 U.S. at 453 .

The actions of the judge when viewed from the standpoint of the entire proceedings establishes that his conduct was such that one might reasonably say it contributed to the conviction or affected substantial rights. Fahey v. U.S. , 375 U.S. 85, 86-87 ; Chapman v. U.S. , 386 U.S. 18 .

E. NO GUIDANCE BY CHARGE WAS GIVEN THE JURY FOR THEM TO BE ABLE TO SPECIFICALLY FIND THE SUBSTANCE ALLEGEDLY POSSESSED WAS HEROIN OR COCAINE

There was no physical evidence of any drug produced in the instant case. During the trial the witnesses were testifying that the substances transferred were cocaine or heroin. When objection was made to those characterizations at the start of the trial (700) the court replied " what he understood to be cocaine. The jury will have to decide that. " Than nothing was told to the jury in the charge upon which they could formulate such a finding. U.S. v. Agueci, 310 F.2d 218, and it's progeny are not the ordinary tools of lay jurrors. In the light of the charge on the presumption of importation from the possession of large amounts of heroin and cocaine (2741, 2771), the court was bound to give the jury some instruction regarding how they might or might not determine the nature of the alleged drugs. Not only was the jury not told about possession but there was nothing told them regarding their duty to find the existance of heroin and cocaine either by direct or circumstantial proof. They were left in the position where they had to simply accept the statements of the witnesses since they were not told they could reject these drug classifications. This in spite of the testimony of agnet Featherly (2418-28) regarding the inability of experts to recognize or distinguish drugs from mere observation or touch.

The failure to define these material portions of the crime charged in an adequate manner for the jury is plain error. see eg. U.S. v. Howard, 506 F.2d 1331, 1332-33; U.S. v. Clark, 475 F.2d 240. This was an indictment charging not only a conspiracy;to import heroin and cocaine but to buy and sell heroin and cocaine and to facilitate the same. Where the jury is not adequately charged they automatically accept the existance of heroin and cocaine in the indictment read to them by the court without ever knowing that it is their right to ultimately judge the worth of the evidence presented. see U.S. v. Bermudez, ____ F.2d _____, (2 Cir. November 6, 1975) Slip Op. 452-53 . The defendants' were substantially prejudiced thereby.

CONCLUSION

THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED

Respectfully submitted,

ROBERT B. SCHWARTZ
Appellant pro se

INDEX TO APPENDIX

D. C. Form No. 100
CRIMINAL DOCKET

Docket 08

74CR 775

JUDD, J.

A

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S. Peter Schlam
vs.	
ROBERT BENNETT SCHWARTZ and	
DAPNEY SCHWARTZ also known as "Joyce"	
	For Defendants ~~Dafnnyx Schwax~~ Gilbert Epstein
	253 Broadway
	New York, N.Y.
	349-3977: AL KRIEGER
Did import and conceal/& sell heroin & cocaine into the USA	401 Broadway (925-5937)

ABSTRACT OF COSTS	AMOUNT		CASH RECEIVED AND DISBURSED				
			DATE	NAME	RECEIVED		DISBURSED
Fine, (Robert Bennett Schwartz)	2000	00					
Clerk,							
Marshal,							
Attorney,							
Commissioner's Court,							
Witnesses,							

DATE	PROCEEDINGS
12-10-74	Before BARTELS J - Indictment filed ordered sealed by the Court. Bench Warrants ordered and issued.
12-14-74	Before JUDD, J - case called - Indictment ordered unsealed. Defts & counsel Gilbert Epstein present - defts arraigned and both enter pleas of not guilty - bail set at $25,000 PRB as to deft ROBERT SCHWARTZ -Bail set at $25,000 Surety Bond as to deft DAPHNE SCHWARTZ - case adjd without date for trial.
12-16-74	Notice of Appearance filed (Both defts)
12-16-74	Before JUDD, J - case called - deft Daphne Schwartz & counsel Gilbert Epstein present - defts application to extend time for posting of bail - motion granted - deft to post bail by 12-17-74

74CR 775

B

DATE	PROCEEDINGS
/23/74	Notice of Appearance filed (R. Schwartz)
/75	Stenographers Transcript dated 12/14/74 filed
1-31-75	Notice of Motion filed & affidavit for suppressing evidence
	(ret. 2-24-75)
2/6/75	Magistrate's file 74M163 inserted into CR file
7/75	Before JUDD,J.- Case called- Defts and counsel present- Deft's motion to
	sppress argued- decision erserved pending submission of further papers-
	by 2/12/75- deft's motion for discovery and inspection granted and denie
	as indicated on record- case adjd to 3/24/75 for trial
/10/75	Stenographers Transcript dated 2/7/75 filed
2-18-75	Affidavit of Peter Schlam filed.
/19/75	Memorandum of Judge Judd filed (re:motion to suppress)
-21-75	Affidavit of Albert J. Krieger filed.
2-24-75	Before JUDD, J - case called - defts & counsels present-suppression
	hearing begun - hearing concluded - decision reserved pending submissi
	of papers.
2-26-75	Govts. /Memorandum in support of an Application for Letters Rogatory filed
27/75	Stenographers Transcipts dated 2/24/75 filed
6/75	Notice of motion for dismissal of indictment filed (ROBERT SCHWARTZ)
14-75	Before JUDD, J - case called - motion to dismiss withdrawn.
/17/75	Request for International Judicial assistance filed
9/75	Notice of motion for suppression filed (DAFNEY SCHWARTZ)
1/75	By JUDD,J.- Order and affidavit of A.U.S.A. Schlam filed and ordered se
/75	By JUDD,J.- Order and affidavit filed and ordered sealed
21/75	Notice of motion for dismissal of indictment ret. 3/24/75 at 10:00 A.M
	(DAFNEY SCHWARTZ)
24-75	Before JUDD, J - case called - defts & counsels present - suppressior
	hearing begun - last month as to Search Warrant contd - defts rest -bot
	sides rest - suppression hearing as to the search at time of arrest
	concluded - defts motions to suppress Search Warrant of Magistrate Raby
	and to suppress fruits of the car search at time of arrest argued -
	decision reserved - adjd to 3-25-75 for suppression hearing as to
	wiretaps.
3-25-75	Before JUDD, J - case called - defts & counsels present - hearing
	begun on defts' motions to suppress wiretaps and certain statements-
	hearing contd to 3-26-75.

74 CR 775
CRIMINAL DOCKET

C

DATE	PROCEEDINGS
/26/75	All motions to suppress except wiretap motion are denied- case adjd
	to 3/31/75 for continuance of suppression hearing on wiretaps and for
	trial
3/31/75	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present with counsel
	Deft Dafney Schwartz not present- counsel for Mrs. Schwartz present-
	Suppression hearing contd in absence of deft Dafney Schwartz-Suppressi
	hearing on wiretaps concluded- defts' motion to suppress wiretapes arg
	motion denied-Govt's application to revoke deft Robert Schwartz's bail
	and to remand deft- motion argued- bail set at $25,000.00 surety bond-
	as to deft Robert Schwartz to be made by 4:30 P.M. on 3/31/75-Govt's
	motion to proceed with trial in absence of deft Dafney Schwartz-motion
	argued- motion granted-deft Robert Schwartz's motion for severance- motion ar
	gued - motion denied- Deft Robert Schwartz's motion to represent himsc
	and to have Mr. Krieger reamin as an advisor-motion granted-Trial orde
	and begun-Jury selected begun-Bench warrant ordered as to Mrs. Schwarz
	Case adjd to 4/1/75 at 10:00 A.M.
4/1/75	Bench warrant issued(DAFNEY SCHWARTZ)
4-1-75	Before JUDD, J. - case called - Deft Robert Schwartz present -
	deft Dafney Schwartz still not present - counsel Gilbert
	Epstein & Al Krieger present - trial continued - jury selection
	contd - Jurors selected and sworn - Govt opens - deft Robert
	pro se renews previous motion for severance - motion denied -
	deft opens pro se -Interpreter M.Mensa sworn - deft Dafney
	Schwartz opens - trial contd to 4-2-75.
4-2-75	Before JUDD, J - case called - deft Robert Schwartz present -
	deft Dafney Schwartz still not present - Trial resumed - all
	counsel present - Trial contd to 4-3-75.
4-3-75	Petition for Writ of Habeas Corpus Ad Testificandum filed.
4-3-75	By Judd, J - Writ Issued, ret. forthwith(Morale)
/3/75	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- Deft DAFNE
	SCHWARTZ still not present-Counsel present-Trial resumed-Govt's motion
	increase bail- motion argued- motion granted-Bail set at $50,000.00 P.
	secured by $25,000.00 cash- bond to be signed by Mr. Schwartz's parent
	Deft's motion to extendtbail limits to N.J.- bail limits extended to C
	Bridge, N.J.-deft Dafney Schwart'z motion for mistrial- motiondenied-T
	contd to 4/4/75 at 10:00 A.M.

D

	PROCEEDINGS
5	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- Deft DAFNEY SCHWARTZ not present- counsel present- Trial resumed- Trial contd to 4/7/75 at 10:00 A.M.
5	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- Deft DAFNEY SCHWARTZ not present- counsel present- Trial resumed- Trial contd to 4/8/75 at 10:00 A.M.
5	Before JUDD, J - case called - deft Robert Schwartz present- deft Dafney Schwartz not present - counsels present - trial resumed - Defts motions for mistrial - motions denied -Deft Robert Schwartzs' motions for severance and for mistrial - motions denied - trial contd to 4-9-75.
-75	Before JUDD, J - case called - deft ROBERT SCHWARTZ present - with counsel - deft DAFNEY SCHWARTZ not present - trial resumed -Deft ROBERT SCHWARTZ's motion for mistrial - motion denied - trial contd to 4-10-75.
75	Before JUDD, J - case called - deft ROBERT SCHWARTZ & counsel present - deft DAFNEY SCHWARTZ NOT PRESENT _ TRIAL RESUMED - Govt rests - trial contd to 4-11-75 at 11:00 am.
75	Before JUDD, J - case called - deft ROBERT SCHWARTX & counsel present - deft DAFNEY SCHWARTZ not present - trial resumed - defts motion to dismiss argued - motions denied - Trial contd to 4-14-75 at 10:15 am.
5	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- deft DAFNEY SCHWARTZ not present-Trial resumed-Trial contd to 4/15/75 at 10:00 A.M.
5	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- Deft DAFNEY SCHWARTZ not present - Trial resumed- Trial contd to 4/16/75 at 10:00 A.M.
75	Before JUDD, J - case called - deft ROBERT SCHWARTZ present - deft DAFNEY SCHWARTZ not present - trial resumed - defts'motion for a mistrial motions denied - defts rest - both sides rest - defts motionts to dismiss argued - motions denied - trial contd to 4-17-75 at 10:00 am. Writ retd and filed- executed
	Before JUDD,J.- Case called- Deft ROBERT SCHWARTZ present- deft DAFNEY SCHWARTZ not present- Trial resumed- Both defts sum up- Govt sums up- Orde of sustenance signed-Judge charges jury-Jury to begin deliberations on 4/18/75 at 10:00 A.M.
	By JUDD,J.- Order of sustenance filed
5	Before JUDD, J - case called - deft ROBERT SCHWARTZ ~~EXECUTRIX~~ present -

4 CR--775

CRIMINAL DOCKET

DATE	PROCEEDINGS
	(CONT'D)
18-75	Returns at 5:35 PM and renders a verdict of guilty as charged as to both defts - Jury discharged - trial concluded - Govts motion to remand deft Robert Schwartz without bail - motion argued - bail set at $150,000 surety - adjd without date for sentencing.
-18-75	By JUDD, J - 2 Orders of Sustenance filed (Lunch & snack)
21/75	Stenographers Transcripts dated [redacted] 3/24/75, 3/25/75, 3/26/75, 3/31/75, 4/1/75, 4/2/75, 4/3/75, 4/4/75, 4/7/75, 4/8/75, 4/9/75, 4/10/75, 4/11/75, 4/14/75 and 4/16/75 filed
-23-75	Stenographers transcript filed dated 4-15-75 (pgs 2286 to 2453)
23-75	By JUDD, J - Order releasing bail filed (ROBERT SCHWARTZ)
29-75	Notice of Motion filed, ret. May 30, 1975, re deft Dafney Schwartz, for setting aside the Jury verdict, dismissal of the indictment, and for adjournment of sentence pursuant to Rules 32 and 43 FRCr.P.
-30-75	Before JUDD, J - case called - deft Dafney Schwartz still reported as a fugitive - defts motion for adjournment of sentence -motion granted - adjd to 9-19-75. Defts motion to set aside Jury Verdict(Dafney Schwartz) counsel Gilbert Epstein present - motion argued and motion denied.
-30-75	Petition addressed to Hon. Orrin Judd filed (received from Chambers)
30-75	Affidavit of Robert Schwartz filed (received from Chambers) and motion by deft for continuation of wire-tap hearings to conclude question of minimization etc.
-30-75	Before JUDD, J - case called - deft ROBERT SCHWARTZ & counsel present pro se - defts motion to reopen wiretap suppression hearing argued - motion denied - defts motion for Judgment of Acquittal and for new trial argued - motion denied - deft sentenced to imprisonment for 10 years pursuant to 18:4208(a)(1) with eligibility for parole after 2 years. Deft fined $20,000. Deft advised of right to appeal - Clerk to file Notice of Appeal in forma pauperis on behalf of the deft.
-30-75	Judgment & Commitment filed - certified copies to Marshal (ROBERT SCHWARTZ)
-30-75	Notice of Appeal filed without fee (ROBERT SCHWARTZ)
-30-75	Docketentries and duplicate of Notice of Appeal mailed to the Court of Appeals (ROBERT SCHWARTZ)

	PROCEEDINGS
5	Certified copy of Judgment and Commitment retd and filed - deft delivered to Federal Detention Headquarters(ROBERT SCHWARTZ)
75	By JUDD,J.- Order filed that deft Robert Schwartz be permitted to have a typewriter brought in the institution for use in perfecting his appeal
75	Certified copy of above order retd and filed- copies sent to Federal Detention Headquarters

413F 72

RJF:PRS:cya
F.#743612

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

ROBERT BENNETT SCHWARTZ and
DAFNEY SCHWARTZ, also known
as 'Joyce'

Defendants.

Cr. No.
(21 U.S.C., §§173 & 174)

- X

THE GRAND JURY CHARGES:

In or about and between August 1969 and April 1971, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', together with

SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', together with Colso Borgono, Juan Bosolo, Lucs Pineda, and Luis Ureta-Morales, also known as 'Lucho', named herein as co-conspirators but not as defendants, and others known and unknown to the Grand Jury, wilfully, knowingly and unlawfully did combine, conspire, confederate and agree together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators fraudulently and knowingly would import and bring into the United States quantities of heroin and cocaine, narcotic drugs, contrary to law.

2. It was further a part of said conspiracy that the defendants and co-conspirators wilfully, knowingly and unlawfully would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of quantities of heroin and cocaine, narcotic drugs, after the narcotic drugs had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent the disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Eastern District of New York and elsewhere:

OVERT ACTS

1. In or about May, 1970 the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', had a conversation with co-conspirator Ureta-Morales, at 258 West 93rd Street, New York, New York.

2. On or about May 12, 1970 co-conspirators Besolo and Borgono received a quantity of cocaine in Brooklyn, New York.

3. Thereafter, in or about May, 1970, co-conspirator Ureta-Morales sold two (2) kilograms of cocaine to the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', for $21,000 at 258 West 93rd Street, New York, New York.

4. Thereafter, in or about May, 1970 co-conspirator Ureta-Morales delivered three (3) kilograms of cocaine to the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', at 258 West 93rd Street, New York, New York and received a partial payment of $10,500 from the defendants.

5. Thereafter, in or about May, 1970 co-conspirators Ureta-Morales and Pineda had a conversation with the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce', concerning the sale of ten (10) kilograms of cocaine to the defendants.

6. In or about June, 1970 co-conspirator Ureta-Morales received $21,000 from the defendants ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ, also known as 'Joyce'.

(Title 21, United States Code, Sections 173 and 174).

A TRUE BILL.

FOREMAN

DAVID G. TRAGER
United States Attorney
Eastern District of New York

BJF:PRS:ald
F.#

74-1630 - Box 1330
" 1631 - " 1317
" 1632 - " 767
" 1633 - " 779
74-1634 - Box 1186

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

SAFE DEPOSIT BOXES NUMBERED 1317 AND 1330 LOCATED AT THE FIRST NATIONAL CITY BANK, 2560 BROADWAY, NEW YORK, NEW YORK; AND SAFE DEPOSIT BOXES NUMBERED 767, 779, and 1186 LOCATED AT THE CHEMICAL BANK, 360 E. 72ND STREET, NEW YORK, NEW YORK,

- - - - - - - - - - - - - - - - - - X

AFFIDAVIT

SOUTHERN DISTRICT OF NEW YORK, SS:

JOHN P. CIPRIANO, being duly sworn, deposes and says

that he is a Special Agent of the Drug Enforcement Administration, duly appointed according to law and acting as such.

Upon information and belief there is presently being concealed in safe deposit boxes numbered 1317 and 1330, located at the First National City Bank, 2560 Broadway, New York, New York and safe deposit boxes numbered 767, 779 and 1186 located at the Chemical Bank, 360 E. 72nd Street, New York, New York, within the Southern District of New York, large quantities of United States currency constituting (1) profits of trafficking in narcotic drugs in violation of Title 21, United States Code, Sections 173, 174 and 846 and (2) evidence that Robert Bennett Schwartz and Dafney Schwartz wilfully failed to file tax returns and wilfully evaded payments of federal income taxes in violation of Title 26, United States Code, Sections 7201 and 7203.

The source of your deponent's information and the grounds for his belief are:

1. All the afore-mentioned safe deposit boxes except box 1317 at the First National City Bank are held in the name of Dafney Schwartz and/or Robert Bennett Schwartz. Box 1317 at the First National City Bank is held in the name of Dafro Realty and Construction Corporation with Dafney Schwartz and Robert Bennett Schwartz being the individuals with access to said box. However, neither Dafney Schwartz, Chairman of the Board ar

President of Dafro Realty and Construction Corporation, nor Robert Pennett Schwartz, Vice President, Secretary and Treasurer of said Corporation, are licensed real estate brokers in the State of New York.

2. Investigation by your deponent reveals that neither Robert Bennett Schwartz nor Dafney Schwartz has filed an income tax return since at least 1968. Moreover, Dafro Realty and Construction Corporation has not filed income tax returns since at least 1968.

3. On December 10, 1974 Robert Bennett Schwartz and Dafney Schwartz were indicted in the Eastern District of New York for conspiracy to violate the narcotic laws. (Title 21, United States Code, Sections 173 and 174). A copy of the indictment is annexed hereto.

is annexed hereto.

4. An interview of Police Officer John B. O'Connor, New York City Police Department, by your deponent reveals that a surveillance by New York City Police Department officers of Dafney Schwartz indicated that Dafney Schwartz went to the United Jersey Bank, Route 9, Oldbridge, New Jersey on three (3) occasions in April and May of 1974 and changed large quantities of cash from small bills to large bills. Dafney Schwartz was then observed on the same three (3) occasions driving from the United Jersey Bank to either the Chemical Bank located at 360 E. 72nd Street, New York, New York, or to the First National City Bank located at 2560 Broadway, New York, New York where she would enter the safe deposit areas of these banks.

5. Interviews by your deponent of officers and tellers at the United Jersey Bank, Route 9, Oldbridge, New Jersey, reveals that between January 1973 and June 1974 Dafney Schwartz came to the Bank approximately three times weekly; that her practice on one of the three weekly visits was to present one teller with between four and six thousand

small bills to large bills and buy money orders or cashiers checks with the other half of the cash; that Dafney Schwartz would also go to a second teller in the same bank approximately twice weekly and present her with between six and ten thousand dollars in cash on each occasion and also receive large bills for half that money and money orders and cashiers checks for the other half.

6. On December 14, 1974, a Saturday, Dafney Schwartz was arraigned before Judge Orrin Judd on the indictment referred to in paragraph two (2) above. Judge Judd set bail for her in the amount of Twenty-Five Thousand Dollars ($25,000) surety bond and gave her until Monday, December 16, 1974 at noon to post the bail. An interview of personnel of the Chemical Bank

by your deponent disclosed that during the morning of December 16, 1974, Dafney Schwartz attempted to gain access to her deposit box at said bank and was told by bank employees that, as a result of Internal Revenue Service action, the bank had been required to seal the box and that she was, therefore, prohibited from entering it. Later that day, December 16, 1974, Dafney Schwartz reported to Judge Judd that she was unable to post the bail. Judge Judd then extended her time to post the bail to December 17, 1974 at 5:00 o'clock P.M. and at that time she posted a $25,000 surety bond.

7. The experience of Drug Enforcement Administration Agents, including your deponent, assigned to the case indicates that a frequent practice of major narcotic traffickers is to "launder" money in the manner described in paragraph 5 above, and to attempt to conceal it by hiding it in safe deposit boxes.

8. Moreover, while the conspiracy alleged in the indictment terminated in April, 1971, there is reason to believe that Robert Bennett Schwartz and Dafney Schwartz continued to

engage in narcotics trafficking. Your deponent was told by Captain Joseph F. Slattery that, from March 1974 to the present time, members of the New York City Police Department have surveilled Robert Bennett Schwartz and Dafney Schwartz. The surveillance has revealed numerous meetings between Robert Bennett Schwartz, Dafney Schwartz and known narcotics violators. The meetings between Robert Bennett Schwartz and known narcotics violators occurred under circumstances not characteristic of a lawyer-client relationship. For example, New York City Police Officers observed Joseph Osborne, a known narcotics trafficker, enter the house of Robert Bennett Schwartz and Dafney Schwartz located at 258 West 93rd Street, New York, New York, carrying a valise. Shortly thereafter Osborne was seen leaving the house

a valise. Shortly thereafter Osborne was seen leaving the house without the valise. Later the same day Robert Bennett Schwartz and Dafney Schwartz were observed leaving the house carrying the valise. Both of them entered their car with the valise and drove to East Brunswick, New Jersey where they met with an individual who is currently the subject of a separate narcotics investigation and delivered the valise to him. Captain Slattery further informed your deponent that a confidential informant of the New York City Police Department, whose information has led to at least five (5) arrests and seizures of substantial quantities of narcotic drugs, advised Captain Slattery that Robert Bennett Schwartz and Dafney Schwartz are presently engaged in the naroctics traffic.

WHEREFORE, your deponent respectfully requests that warrants issue authorizing entrance with proper assistance of safe deposit boxes numbered 1317 and 1330, located at the First National City Bank, 2560 Broadway, New York, New York, and safe deposit boxes numbered 767, 779 and 1186 at the Chemical Bank located at 360 E. 72nd Street, New York, New York, within the Southern District of New York, and to search for and seize large quantities of United States currency constituting (1) profits

of trafficking in narcotic drugs in violation of Title 21, United States Code, Sections 173, 174 and 846 and (2) evidence that Robert Bennett Schwartz and Dafney Schwartz wilfully failed to file tax returns and wilfully evaded payment of federal income taxes in violation of Title 26, United States Code, Sections 7201 and 7203.

Sworn to before me this
day of December 1974.

UNITED STATES MAGISTRATE
SOUTHERN DISTRICT OF NEW YORK

Form A.O. 93 (Revised Sept. 1970) Search Warrant

TF:PRS:cya

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

VS.

SAFE DEPOSIT BOX NO. 1186
CHEMICAL BANK
360 EAST 72nd STREET
NEW YORK, NEW YORK

Magistrate's Docket No. 71

Case No. 1637

SEARCH WARRANT

To ANY SPECIAL AGENT, DRUG ENFORCEMENT ADMINISTRATION, AND TO ANY UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK OR TO HIS DEPUTIES, OR TO ANY AUTHORIZED OFFICER:

Affidavit having been made before me by JOHN P. CIPRIANO, SPECIAL AGENT, DRUG ENFORCEMENT ADMINISTRATION

that he { has reason to believe } that { on the premises known as }

SAFE DEPOSIT BOX NO. 1186, CHEMICAL BANK
360 EAST 72nd STREET, NEW YORK, N.Y.

in the SOUTHERN District of NEW YORK

there is now being concealed certain property, namely large quantities of heroin and
here describe the property to be seized
currency constituting (1) profits of trafficking in narcotics drugs in
violation of Title 21, United States Code, Sections 173, 174 and 176
(2) evidence that ROBERT BENNETT SCHWARTZ and DAFNEY SCHWARTZ wilfully failed
to file tax returns and wilfully evaded payments of federal income taxes in
violation of Title 26, United States Code, Sections 7201 and 7203.

~~XXXXXXXXXX~~

here give alleged grounds for search and seizure

and as I am satisfied that there is probable cause to believe that the property so described is
concealed on the { ~~XXXXXX~~ / premises } above described and that the foregoing grounds for application for issu-
ance of the search warrant exist.

You are hereby commanded to search forthwith the { ~~person~~ / place } named for the property specified,
serving this warrant and making the search { in the daytime / ~~XXXXXXXXXXXXXXXXXX~~ } and if the property be
found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare
a written inventory of the property seized and return this warrant and bring the property before me
within ten days of this date, as required by law.

Dated this 24th day of December , 19 74

Rule 41 of the Federal Rules of Criminal Procedure provides: "The warrant shall be served in the daytime, unless the issuing authority by appropriate provision in the warrant and for reasonable cause shown authorizes its execution at times other than daytime. It shall be served upon the person or in the place named."

RETURN

I received the attached search warrant 12/26, 1974, and have executed it as follows:

On 12/27, 1974 at 9:30 o'clock A.M., I searched {the person / the premises} described in the warrant and

I left a copy of the warrant with Miss Betty Conis - Manager
name of person searched or owner or "at the place of search"

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. 75,700 U.S. Currency
2. $70.00 Canadian Currency
3. 310 Israeli
4. 1 Peso Colombian Currency
5. 1 Blue Stone Ring
6. 1 Tie Pin with 4 yellow stones
7. 1 [illegible] colored [illegible] stone ring.
8. 1 Blue stone ring.
9. Cuff links [illegible] L.B.
10. 1 ring in plain case [illegible] stone
11. 1 silver colored necklace chain
12. gold colored necklace chain
13. [illegible] continuing
   [illegible] watch #23
   [illegible] watch
   c)
   2 rings gold colored + silver colored
   [illegible] 1 pin with pearl settings
   [illegible] gold [illegible] wrist watch
14. 1 set cuff links [illegible]
15. Stocks
   A) 8024 Shares of [illegible] Public Service
   B) 100 Shares National [illegible]
   C) 17½% Debenture - [illegible] Tele. Co. Ltd. Amt. of $1,200
16. 3 folders + several loose papers concerning business records + financial holdings.

This inventory was made in the presence of S/A Dennis Perry + Capt. Jos. Slattery, N.Y.P.D. and Miss Betty Conis - Bank Manager.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to and returned before me this day of , 19 .

U. S. Magistrate.

based on two grounds. First, they allege that the affidavit of Agent Cipriano contains false and illegally obtained information, and that a hearing is necessary to enable them to establish these claims. Second, the defendants argue that even if all the statements in Agent Cipriano's affidavit are true and legally obtained, the affidavit was inadequate as a matter of law to justify the search.

4. In connection with their first ground, the defendants seek to attack paragraphs two (2) and five (5) of Agent Cipriano's affidavit. Paragraph two (2) of Agent Cipriano's affidavit states that neither Robert Bennett Schwartz nor Dafney Schwartz filed income tax returns since at least 1968. Their attack on paragraph two (2) is based on their claim that the information contained therein was obtained for the first time by Agent Cipriano from Robert

obtained for the first time by Agent Cipriano from Robert Bennett Schwartz after his arrest on December 12, 1974, and in violation of what the defendants term a "prosecutorial promise and official advice." The fact of the matter is that Agent Cipriano knew the information contained in paragraph two (2) of his affidavit before the defendants were even arrested. In this regard, we are attaching an affidavit of Special Agent Edward F. McCormick of the Internal Revenue Service to the effect that on December 11, 1974, Agent McCormick told me that neither Robert Bennett Schwartz nor Dafney Schwartz had filed income tax returns since at least 1968. I immediately communicated that information to Agent Cipriano. Agent Cipriano, therefore, knew the information contained in paragraph two (2) on December 11, 1974. Accordingly, the defendants' claim that it was first obtained by Agent Cipriano on December 13, 1974, from Robert Bennett Schwartz is completely untrue.

5. The defendants also claim that the statements

A F F I D A V I T

EDWARD F. McCORMICK desposes and says:

1. I am a Special Agent of the Intelligence Division of the Internal Revenue Service.

2. I am conducting an investigation of Robert Schwartz and Dafney Schwartz.

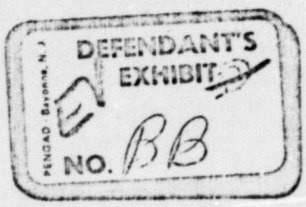
3. On December 11, 1974, I had telephone conversations with Assistant United States Attorney Peter Schlam. During the course of said telephone conversations, I advised Mr. Schlam that my investigation had determined that neither Robert Schwartz nor Dafney Schwartz had filed income tax returns at least since 1968.

4. This affidavit has been prepared at the request of Assistant United States Attorney Peter Schlam.

Edward F. McCormick
EDWARD F. McCORMICK

Subscribed and sworn to
before me this 13 day of
February, 1975.

John J. O'Hara
John J. O'Hara
Special Agent



December 13, 1974

I, Robert Bennett Schwartz have requested representatives of the United States Attorney for the Eastern District of New York to delay my arraignment in order that further discussions between me and representatives of the Government can proceed in privacy. The United States Attorney has agreed to my request. I realize that I have a right to a prompt arraignment and I freely and voluntarily waive that right. I have further been advised of my rights and I freely and voluntarily waive them as is indicated by my signature on the attached "Advice of Rights Form." I have further been advised that my discussions with representatives of the Government are intended to determine if my cooperation is truthful and complete and therefore will not be used against me at a later time.

ROBERT BENNETT SCHWARTZ

~~Sworn to before me this 13th day of December 1974.~~

Peter C. Schlam
Ass't U.S. Attorney

Witnessed: John A. Cipriano
Dennis Feeney